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No. 111

IN THE

Supreme Court of the United States

October Term, 1960

BURTON N. PUGACH,

Petitioner,

—vs.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

EDWARD S. SILVER,
District Attorney, Kings County,
Municipal Building,
Brooklyn, New York,
Attorney for Amicus Curiae.

AARON NUSSBAUM,
Assistant District Attorney,
Kings County, New York,
Of Counsel.

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APPENDIX

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS
FIRST SESSION

(PURSUANT TO S. RES. 62, 86TH CONGRESS, 1ST SESSION)

PART 3

WIRETAPPING, EAVESDROPPING, AND THE BILL OF RIGHTS

JULY 9, 1959

Senator Hennings. The committee will please come to order.

We have the honor of having with us today a very distinguished law enforcement official, distinguished lawyer, and legal scholar, the Honorable Edward S. Silver.

Mr. Silver is district attorney of Kings County, N. Y., and has been so for the past 6 years, I believe.

He is also past president of the New York State District Attorneys Association and is presently vice president and, as I understand it, president-elect of the National Association of County & Prosecuting Attorneys.

I can say more about Mr. Silver but will content myself at this time with introducing him in that fashion and letting him proceed in his own way, if he will, to discuss the matter now under consideration by this subcommittee. This is, as we all know, wiretapping, eavesdropping, and the Bill of Rights and cognate matters, with a view to ultimately suggesting some legislation or forebearing, indeed, to suggest legislation, if that be the decision, when our hearings are concluded.

So we welcome you here today, Mr. Silver, and thank you very much for your appearance.

You may proceed, of course, in any manner that you like.

STATEMENT OF HON. EDWARD S. SILVER, DISTRICT ATTORNEY, KINGS COUNTY, N. Y.

Mr. Silver. Mr. Chairman, Senator Carroll, it is a pleasure for me to be here.

Just so the record be straight, I am not the president-elect of the National Association of County & Prosecuting Attorneys.

Senator Hennings. That is what they told me.

Mr. Silver. I am the executive vice president. I think, according to the laws of succession it is a likelihood that I may become that at the end of July this year but I don't want to prejudice my chances for that post by any premature predictions.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Senator Hennings. It is not a fait accompli, that is the point.

Mr. Silver. Mr. Chairman, it is a very unfortunate thing that when we discuss this subject, we have to use the words "wiretapping and eavesdropping" which in themselves—

Senator Hennings: They have a connotation.

Mr. Silver. A very evil connotation.

Senator Hennings. Like juvenile delinquency. But we have to use some words, or some phrase, to describe what we are talking about.

Mr. Silver. I was trying to think of a word, and perhaps someone will get a modern word or phrase for modern crime detection device. When we do that, we will be a bit ahead of the game. It will encourage clearer thinking of this subject before us.

I do want to say this about the testimony of Mr. Dash. He has so well said—I have given him every possible help I could in his inquiry, but the one thing that he has made clear is that no law or court decision will have much effect on unlawful wiretapping by private individuals, whether in labor or business, or police who are corrupt. At the outset I should say that the record of the district attorneys show that nobody has been more vigorous than we have been in making the laws as stringent as possible against any private people, not only doing any eavesdropping but even owning equipment. We must always keep in mind the distinction between law enforcement agencies who are fighting crime, and private persons or groups who use wiretapping for their nefarious purposes.

He has indicated that law enforcement agents have some reluctance about prosecuting people who are in violation of

eavesdropping laws. That is not so. In New York State where we have, as Mr. Dash has said, the most forward-looking and best laws on the use and control of wiretapping, we do not hesitate to prosecute people who violate the laws. In fact, in April of this year we indicted and convicted two police officers for improperly tapping a wire without a court order. They have of course been dismissed from the police department.

We even tried a deputy police inspector but the jury was evenly divided and the case resulted in a mistrial. After thoroughly reviewing the case everybody felt it better to dismiss the indictment and let the police department proceed with its departmental trial. After the jury disagreed we then dismissed it because we didn't think we could possibly prove the deputy inspector's guilt beyond a reasonable doubt.

We only indicate that to show that district attorneys, at least in my part of the country, have no hesitancy whatever to prosecute anybody against whom we have evidence of wrongdoing, even law enforcement officers.

Now, there are organizations, and there are people who feel they have to be against wiretapping, because by doing so it kind of makes them ipso facto "liberals," whatever that word means. I don't know just what it means—but if the term means a love and devotion and a constant watchfulness of our liberties as Americans, which I enjoy, and I want my kids and grandchildren to enjoy, then I will take the label too.

A lot of people are very careless about what they say when they deal with the problem of wiretapping. Every-

body sort of likes to wrap themselves around with the robes of Mr. Justice Holmes and Mr. Justice Brandeis and they talk about the *Olmstead* case (277 U. S. 438; 485 Ct. 564) and they like to use the term "dirty business" in connection with wiretapping, but I doubt whether 1 percent of those people have ever read the *Olmstead* case.

The *Olmstead* case dealt with a situation where Federal officers in connection with some bootlegging case in violation of the statutes[1] in the State of Washington unlawfully tapped wires and on the basis of these unlawful taps, convicted the defendants. It's important to keep in mind how the phrase "dirty business" was born.

Both Mr. Justice Holmes and Mr. Justice Brandeis said that law enforcing agents should not violate the law. No district attorney argues with that. Thus the *Olmstead* case and all talk of "dirty business" has no reference at all to a situation like the State of New York where our constitution in a provision similar to the search and seizure clause, and by enabling statutes, gives the district attorney and other law enforcing agent as higher police officials the right to tap wires under certain conditions. If they will sign an affidavit in which they say, under oath, that they have reason to believe they can get evidence of crime by setting forth sufficient facts to justify the conclusion, and subject themselves to examination by the court to justify the reasonableness of the request for the order, then and

[1] The Washington statute read as follows: "Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor" (Remington's Comp. Stat. 1922, §§2656-18, 1922).

only then can an order be procured to tap a wire. The order is for a limited time of 2 months and can be renewed only on a showing of reasonableness.

Wiretapping by law enforcement agencies only with the proper safeguards which I have indicated doesn't mean that one is not very alert to civil liberties, with which I think all of us are very concerned. I would like to say that, for example, the New York State District Attorney's Association has sponsored more bills for the protection of defendants—I am talking about district attorneys—has sponsored more bills for the protection of defendants than the Civil Liberties Union or any bar association in our State.

Just to give you some of the things we have been sponsoring and trying to get our legislature to pass, we introduced the bill that an indigent defendant by getting a court order may get daily minutes and such moneys as he may need to hire experts to prepare his defense. The district attorneys introduced that, not the Civil Liberties Union or the bar associations.

Senator Hennings. You believe, Mr. Silver, as do some of us who have had experience in the prosecution of felonies in large cities, or indeed in smaller communities, you believe that the prosecutor, the district attorney, has a duty to the public and embraced within that duty is the duty to the defendant, to see that the defendant has a fair trial?

Mr. Silver. He had a very clear duty to the defendant, as I had occasion to say just that recently when the Legal Aid Society of our city at my suggestion and others sent over some of their lawyers to help defendants defend themselves.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

In a true sense, I never win or lose a case in the sense that a fellow wins or loses a ball game. We present the evidence we have. We are careful to see that the evidence is correct. If the jury comes out and says not guilty, I don't have the feeling that I have lost the case.

Senator Hennings. Prosecution isn't a game.

Mr. Silver. Exactly, Mr. Chairman.

Senator Hennings. We hear some claptrap about fellows who never lose cases. I have often said that the ones who never lose cases are those who have tried practically none, or liars.

Mr. Silver. I have, for example, a copy of my 1955 report and it is clear that I didn't write this in connection with this hearing—permit me to quote from the foreword of that report:

While I welcome comparison of the work of my staff with that of any other district attorney's office throughout the State, I have abstained from quoting percentage of successful prosecutions because of my sincere belief that it is not a true measure of the work of the district attorney's office. Justice, and only justice, must be our goal and a desire for results that will insure statistical excellence may frequently interfere with the attainment of this end.

It is philosophy which I am sure not only I hold but the vast number of district attorneys throughout the country.

Senator Hennings. You and I know when they start racking up their percentages of convictions those include many, many cases in which pleas of guilty are entered and in which the defendant doesn't even offer a defense.

Mr. Silver. Mr. Chairman, if I were concerned with the percentages of wins, I would just tell my grand jury de-

partment, don't ever indict anybody unless you are pretty sure we will convict them in the trial court, which means that bums and crooks and racketeers would not be indicted because district attorneys would be concerned with their "batting averages."

We will give the hoodlums and racketeers as tough a time as we can if we have the legal rights to do it. We can never tell what additional evidence we can procure after indictment. If we have sufficient legal evidence to indict we do so. We are not concerned with percentage of wins.

If I may continue, for example, in New York State some crimes become a felony if they are committed the second time which are misdemeanors the first time. Under such a case we put the fact of the prior conviction in our indictment. We felt it is unfair to the defendant to read to the jury the fact that this man has been convicted of the same crime on a prior occasion. The jury is likely to feel he has been convicted of drunken driving once and the jury is likely to say, if the fellow was drunk once, I suppose he is guilty this time too.

We introduced a bill which would prohibit the district attorney from mentioning it during the trial of the case if the defendant would admit the prior conviction on the court record out of the hearing of the jury.

Again I say, the district attorneys introduced that, not the Civil Liberties Union, or the bar associations.

We have in New York State a law under which we can treat an offender under 19 years old as a youthful offender. Under the youthful offender treatment if a young man commits a crime, on the record he may say he has not been convicted of a crime.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Now, sometimes the youthful offender may have gotten the youthful offender treatment even for perjury or some degree of robbery. He may testify against a defendant charged with a crime and he is not permitted to be cross-examined even about the act under which he got the youthful offender treatment.

In other words, the defendant has no way of attacking the credibility of a witness against him.

We have introduced legislation to say the defendant should have that right.

Again I say the district attorneys did that.

In some situations, where a man has been sentenced improperly, even though he may be a multiple offender, the thing may not come to light until after he has done more time on the crime than he should have on which the sentence is changed. In other words, he might have been given 5 to 10. He may have done 6 years of that or 5 years and then it is found that he should only get 3 but he is in jail on another crime. If he had done more time on one, he ought to be getting credit on the one that he is serving time.

The district attorneys are advocating that. The record is abundantly clear that district attorneys are vitally concerned with our rights as Americans. Let no one confuse the record when we advocate the use of wiretapping, with the proper safeguards of course, to fight crime it is not a violation of constitutional rights as such. Those rights are as sacred to us as to anyone. The record shows it.

If I may, just one other thing for example—

Senator Hennings. One thing interests me at this point. I happen to be chairman of the national penitentiaries committee.

Often detainers are placed against men in institutions, State or Federal, men under long sentences, and upon their release they are picked up and prosecuted again. I would assume that in the functioning of your office, as I understand your general philosophy, you would make that a discretionary matter.

Mr. Silver. As to prosecuting him again?

Senator Hennings. Yes.

Mr. Silver. Absolutely.

Senator Hennings. You would determine whether you wanted to pick him up at the gate of one institution from which he has been released for good conduct, maybe a little short of his regular time, but having served a substantial sentence, and haul him back for something he did 10 years ago or 20 years ago, and try him again.

Mr. Silver. As a matter of fact, now, Mr. Chairman—

Senator Hennings. It is bad when that thing is misused in our penal institutions. There are times, of course, when it should be used.

Mr. Silver. I will tell you another reason why it should be. When the man has a detainer lodged against him, he does not get such a thing as jail liberties and they are very important to a man that is detained.

Now, in New York State today, not only because of the decision of our court of appeals (*People* v. *Prosser*, 309 N. Y. 352), but a bill has been passed where a defendant in jail, where there is a detainer against him, may demand a disposition of that proceeding. If it is not disposed of within 180 days, it is automatically dismissed. (N. Y. Code Crim. Pro. sec. 669-a.)

The district attorneys backed that legislation so that we have no desire to just keep rubbing it on the fellow because

he happens to be in jail. People are not chocolate bars coming off a belt line. Each case must be examined separately.

I say in our desire to be fair, and I may be belaboring this point, but I wanted to make it clear, that the fact that you take one position on wiretapping and law enforcement has absolutely nothing to do and has no relationship with whether you are interested in civil liberties and in defending the Bill of Rights under our Constitution.

In the same report of the work of my office, I had a little paragraph here which I called my chats with the grand jury. It reads:

Whatever our occupation or profession, it is important always to keep in mind that we are all engaged in a fight to preserve our democratic principles.

The institution of the grand jury is a piece of machinery that took 800 years to establish and is more important today than it ever was.

Your district attorney makes it a point to talk to each of the grand juries when it is empaneled. I try to convey to them their importance in our system of justice. I make it clear to them that they are not the court's or the district attorney's grand jury. Indeed, that they are there to protect the citizenry from the possible tyranny of the district attorney; that an indictment found against a person, whatever may subsequently happen to the case, is of the most serious consequence to the defendant, and that often the indictment is all that his fellow citizens may remember, even forgetting an acquittal if it should occur. They are cautioned to find an indictment only in credible, legal evidence.

It is not enough for us to believe in democracy. Belief is of no value if it is not followed by practice. The district attorney must be ever alert and zealous in carrying out

his duties, but he, too, must be careful not to thwart our hard fought democratic procedures. The end does not justify the means unless it conforms strictly to the law which expresses the will of the people.

Senator Hennings. Very good.

Mr. Silver. I think I have said enough about the fact that we love law and we love civil rights and we want to be decent citizens and we recognize our duties as such.

Now, I want you to know, too, that the district attorneys have been against giving anybody the right—district attorney, attorney general, or anybody else—the right to use wiretapping in furtherance of crime detection without a court order.

This goes back to May 6, 1954, when my law partner, who was testifying before some committee, either House or Senate, wanted my views on it. I put it in writing.

I said I understand the Attorney General does not favor a provision in the proposed bill—there was some bill before the Senate requiring a court order based on showing of reasonable cause authorizing the tap.

I wrote him in part:

As a district attorney in the second largest county in the country, I resort quite frequently to wiretapping in our fight against crime. Under the statutes I am required to get a court order, and I welcome it as a reasonable restraint.

"Power is a heady thing," as Mr. Justice Jackson said, and just preceding that wise observation, he remarked, "So that an objective mind might weigh the need, the right of privacy was deemed too precious to trust to the discretion of those whose job is the detection of crime and the arrest of criminals."

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

I don't want to burden the record. I'll just leave this letter with you, and you can put it in the record.

Senator Hennings. Thank you, Mr. Silver. Without objection the letter will be received and made a part of the record.

(The letter referred to follows:)

May 6, 1954.

Nahum A. Bernstein, Esq.,
New York, N. Y.

Dear Nahum: I thought it would be best to put in writing some of my thoughts expressed to you in connection with your appearance before Senator Wiley's committee that is considering wiretapping legislation.

I understand that the Attorney General does not favor a provision in the proposed bill requiring a court order, based on a showing of reasonable cause, authorizing the tap. As the district attorney in the second largest county in the country, I resort quite frequently to wiretapping in our fight against crime. Under our State statute, I am required to get a court order and I welcome it as a reasonable restraint.

"Power is a heady thing," as Mr. Justice Jackson said (*McDonald* v. *United States*, 335 U. S. 451, 455-456 (1948)), and just preceding that wise observation he remarked "so that an objective mind might weigh the need • • • that right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

If it should be argued that the procurement of an order would be a delaying factor in proceeding with the business at hand, I can tell you that getting the order is a simple matter and can be gotten in a few hours, or less, if the situation should require it.

Indeed, the mechanics in setting the tap is far more difficult and time consuming. Locating the "pairs" and the

installation of the tap are not too time consuming, but getting the proper "plant" (listening post) is not an easy thing and at times has taken us days and even a week and more to set. The greatest care must be exercised in the establishment of the "plant" or the whole operation will blow up in short order.

The ordinary citizen is too worried or frightened that he might get involved if he provided the place for a "plant." Even where he is not, the coming and going of men quickly creates suspicions of neighbors and even the police who are not part of the operation. This difficulty varies with the location of the wire to be tapped. It is easier in business areas and the difficulty increases as the area is more sparsely settled.

Indeed, when we think we desire to tap a wire, we can have the order and affidavit ready long before we have our setting in order. We have never found the necessity to get an order an obstacle.

As a district attorney, I must not forget that at times in the zealousness to solve a crime I might be tempted to thrust aside protective procedures that have come down to us as a result of many hard-fought battles. Four centuries ago Lord Coke (Second Institutes (1656) 48) said:

"Every oppression against law, by colour of any usurped authority, is a kinde of destruction * * * and it is the worst oppression that is done by the colour of justice."

I want to say that I strongly favor the Attorney General having the power to tap wires in his fight against subversives. We must get the modern tools to fight those who use the modern tools for their nefarious purposes. Yet with this necessary power should go the objective view of the court in granting an order permitting a tap.

Sincerely,

EDWARD S. SILVER.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Mr. Silver. Four centuries ago, Lord Coke said:

Every oppression against law, by color of any usurped authority, is a kind of destruction * * * and it is the worst oppression that is done by the color of justice.

Senator Hennings. Do you think, Mr. Silver, wiretapping practices would be improved if only district attorneys could obtain court orders?

Mr. Silver. Well, I think the district attorney, without being offensive to any other law-enforcing groups, I think he is more conscious of his obligation than perhaps, maybe, a police officer might be, if not of a high rank. I am sure that our own police commissioner himself, who happens to be a lawyer, Commissioner Kennedy, probably feels much the way I do about it.

My friend, Sam Dash here, has given you some figures about 13,000 or 21,000 unlawful wiretaps which are all built up and multiplied by the number of pen—I think he called it—pen recorders, which is an apparatus which we have for getting the number d:.n of somebody while he is dialing when you have a tap on his wire.

When I read Mr. Justice Douglas' statement about 58,000 tap orders being procured in New York City in 1 year (1952), I really became quite disturbed. In the first place, if you thought about it for a moment, if you had 58,000 tap orders in 1 year, with every plant having to be covered by eight men, there wouldn't be a New York policeman on the street. We have only got about 24,000, and we would have to get the Marines and Navy out to man the.e wires. It is an impossibility. I made a careful check of the number of orders procured and the fact showed only 480 orders were

gotten by all five district attorneys and the police department.

I am looking forward to seeing Sam's book, and I let the police commissioner of our city answer the estimate of 13,000 to 21,000 unlawful wiretaps by police officers. I only wanted to say for the record that I express a very, very serious doubt as to the accuracy of a figure built up by the number of pen registers that happen to exist in the police department. At best one must be very wary of statistics—but when built on a fanciful premise they have no validity at all.

Now, there is a tremendous amount of fanciful and imaginary fears that have been trumped up in the minds of a lot of people about what is going to happen if we let law-enforcing agencies under proper restraints of court order tap wires. Permit me to address myself to that situation.

As I said before, nobody can be more zealous than district attorneys for the most stringent laws for private people who tap wires. We would say, make even the possession of such equipment unlawful, so we wouldn't have the difficulty we now have of having to try to convict a man beyond a reasonable doubt.

I know we district attorneys don't enjoy the luxury that the Senate committees have. A Senate committee puts a man on the stand and if he says I take the fifth amendment, they have won a case, they have convicted. When we get a man—

Senator Hennings. Let's say "some Senate committees," if you don't mind. Some Senate committees seem to think that the fifth amendment isn't part of the Constitution.

Mr. Silver. When we get a man who refuses to testify, we have nothing. We have to go out and get the evidence.

Senator Hennings. Some Senate committees, Mr. Silver, act as though they have never heard of law or of the Constitution or the Bill of Rights, and they talk about taking the fifth amendment as though people have no right to take it. Why don't some of these worthies offer a resolution to amend the Constitution to take the fifth amendment out? I have often wondered, if they think it is so bad, why not try to take it out and then they won't have to—

Mr. Silver. My silence is only as a result of my not being here to talk about what any other Senate committees may be doing. I am not expressing myself one way or the other.

Senator Hennings. I mentioned no special Senate committee.

Mr. Silver. As I said before, there is an awful lot of fanciful and imaginary fears trumped up of what is going to happen to our country if we permit a lawful wiretap.

Why worry about speculation when we have the laboratory of the largest State in the Union. We have 62 counties and some 16 million people; we have been permitted to use this instrument to fight crime for 20 years.

When the Savarese committee came into being, they sent out a questionnaire to every district attorney, a detailed questionnaire. I got a copy of that questionnaire and I sent it out that the 54, it figures here, if you want them, 54 orders may have covered maybe 70 or 80 telephones. Sometimes when we get an order, take a criminal group, are working out of a switchboard, we may get an order covering every one of those phones, but actually only tapping one wire of

the 32. So that we will have it accurately, let me give you the number of orders we procured during certain years and the number of phones it covered.

(The information is as follows:)

Year	Number of orders	Number of phones
1951	67	85
1952	54	68
1953	33	41
1954	60	96
1955	59	72
1956	30	59
1957	39	108

Mr. Silver. If the fellow we are after is in a particular place, you can't possibly—it is difficult to tap a switchboard where there are 32 wires. We don't have the equipment to do it, nor do we have the men to do it.

Mr. Slayman. That covers all people who use those phones, even if criminals are using them only 10 percent of the time?

Mr. Silver. When we get an order, we get an order for a wire, not for only a particular person speaking from that wire. We couldn't possibly delineate it in that form. Let me suggest a question you might wish to ask me. "Mr. Silver, do you also tap on occasion public telephones?" My answer is "Yes." If we are after criminals whom we ascertain are using a public telephone in their operation, we will get a court order to tap that public phone. We would hear all conversations on that phone. The record shows that we have kept our interest only on the criminals. We have never abused that right. The record also shows, and

the Savarese committee said so in its report, that in 20 years they have never, had one instance where the district attorney has abused this privilege. It is just a sentence or two on page 17 of their report of March 1957.

It says:

We know of no instance in which illegal wiretap evidence has been offered by any prosecutors since law enforcement wiretapping was regularized in 1938.

In other places in this report, there has never been the slightest suggestion that district attorneys have ever abused this right which we use for law enforcement nor did the Savarese committee suggest that the right should be curtailed.

Now, actually, I think it ought to be said and made clear that this is not a right or power that the district attorney has. I have this right as a trustee for 3 million people that I have to represent in fighting crime. If, for any reason, the Senate or the Congress doesn't do something to correct the *Benanti* decision, we just will not be able to use wiretapping in our law enforcement, and it simply means that a lot of people are going to have carte blanche in their criminal operations. You will not be depriving me but the people who elected me to fight crime in our county. If I am compelled to hunt lions with a peashooter, so be it. I think the Congress has a serious responsibility in this matter.

Senator Carroll. May I interrupt?

Following Senator Hennings' question to you, your 1954 orders were orders given to the district attorney, is that correct?

Mr. Silver. That's correct.

Senator Carroll. Does it cover police orders?

Mr. Silver. It does not. The police orders, Senator, have their own legal bureau and they may procure court orders on their own.

Senator Carroll. Then in your district attorney's office you have independent investigators and you do your own law enforcement, do you?

Mr. Silver. We have some investigators in our office. There are district attorneys' offices, as was indicated before when Mr. Dash was testifying where the district attorneys merely prosecute the evidence that the police bring them. In my office and in Mr. Hogan's office and in the five counties in my city, and in others throughout our State, we go out and investigate situations ourselves. We do not wait until the police department brings it in to us because there are many situations where the police are so busy with the ordinary current crimes of violence that they don't have the time to look into, as for example, into certain phases of labor racketeering. For example, 2 years ago there was an outfit, under the guise of running a labor paper, which collected almost a quarter of a million dollars in 6 months from business people on the theory that they were getting the money for a labor paper. We convicted those people but it took us months of investigating. I am sorry I didn't bring the record of one of the conversations which we recorded so you could listen to it properly because I have permission from the man whose wire we tapped saying you can use it for anything you wish.

We never could have convicted those labor racketeers if we didn't have the use of wiretapping.

Senator Carroll. I just wanted the record to show that you have the power to initiate investigation.

Mr. Silver. Right.

Senator Carroll. That you may apply for court orders. I assume you have the power to arrest.

Mr. Silver. Well, we have the power to arrest because we have men assigned to us by the police commissioner. I have approximately 70 policemen assigned to my office by the police commissioner who can go out and make an arrest. While technically they are under the command of the police commissioner, for all intents and purposes he lets me actually be the boss of those men.

Senator Hennings. I think that is true in most cities. When I was a prosecuting attorney, I always had investigators and a police detail attached to my office. They didn't go out and make cases. They went out, followed up leads, and went to interview some of the witnesses from whom the police, perhaps, had not sufficiently obtained all the facts we needed.

Mr. Silver. You asked before about the number of orders. For example, for those figures I gave you for the years 1951 through 1954, there were 214 orders covering 290 wires.

Senator Carroll. There is a time limitation on those orders, too; is that correct?

Mr. Silver. Yes; it used to be 6 months. It has been amended to 2 months. You can go back to the court and on showing get an extension of the order if you need it.

In other words, you have to come back to the court and report to him that you feel you are justified in getting an extension. If the court is satisfied, you may get an extension.

You would, if you would like to get an extension, you submit another order extending that order for another 2 months, but no more than 2 months at a time. Generally, you know within 2 months whether an order is good or not.

Sam Dash has testified about the fact that you take a sample of the wire and see if it is "hot" and then you get your order. I can only say that that does not happen in my office. I am not going to say what the police do though I doubt it, because I have not checked into that, but in my office we don't know whether a wire is going to be profitable or not. We only get a court order when we have sufficient independent evidence on which I can say that I have reasonable grounds to believe that we will get evidence of crime.

I may say for the record that if we get an anonymous letter—it can be in the greatest detail—under no circumstances will we apply for a court order on an anonymous letter. We never know who is going to write about whom and try to annoy somebody, so we have an office rule—and I am sure it applies to other district attorneys—we just will not apply for a court order if it is only based on an anonymous note.

We first go out and investigate, and if we get enough substantial evidence—and many anonymous letters are very valuable—we can then, if we wish, get a court order.

We don't get them all the time.

If we average one a week, we are doing all right. We don't run around doing that. We don't have the men. We don't have the equipment to do it.

We do it only when we think it is important.

Senator Carroll. When you apply for a court order, you do so in chambers?

Mr. Silver. That's right.

Senator Carroll. Is this testimony taken at that time for the record?

Mr. Silver. Not for the record, but the judge may ask such questions as he desires either from the police officers or investigators, or the assistant who goes with the police officer because we hesitate to put in—

Senator Carroll. Do you make a showing by a written affidavit; or how do you make a showing? What is there in the nature of a record that is made?

Mr. Silver. It is a written affidavit which in itself must show the district attorney has reasonable grounds to believe he can get evidence of crime by a tap. He states facts in it that show to the court that he has reasonable grounds to believe that if you tapped this man's wire, we have reasonable grounds to believe we will get evidence of criminal activity. That is in the affidavit. It must be within the affidavit.

The judge may still, if he desires, make further inquiries to satisfy himself that our request is proper.

The reason we don't like to have it down on the record is that if the judge wants to know where we are getting our information, we don't want that on the record—not that we are worrying—we have never had an example where a judge has, to use a colloquialism, burned our wire up—but we don't like to put that information in because people will hesitate to give us information if their names are going to appear in affidavits or in typed records.

So we cite information given to us by an informant although we don't give the name.

If the judge wants to know more details, we will be glad to give it to him, including the name of the informant.

As I said, again, when you talk about these imaginary ills, I think this is going to be interesting to this committee—

Senator Carroll. This is based on the affidavit itself.

Mr. Silver: On the affidavit and such other evidence as the judge may want to satisfy himself before he signs the order.

We submitted to the Savarese committee sample affidavits on which we procured our order. It is very much the same as when you get an application for a search warrant. It is the same type of affidavit. You must show reasonably necessity,

Even under that situation the judge may say, "Tell me a little bit more about it before I sign the order."

Senator Carroll. The police follow the same system because this is provided for by State law.

Mr. Silver. They are under the same act. They have to operate under the same order we do. The imaginary things that people dream up, that all liberties are going to be destroyed if we let anybody tap wires—I can't give you all, but it would be very interesting if you people would read the debates on the very Constitution which we are concerned with now, when it was considered for adoption.

You get a fellow like Patrick Henry who, everybody admits, was a great patriot, and he said, in connection with the Constitution "I would rather infinitely have a king, lords and common, than a government so replete with such

insupportable edicts." He is talking about the Constitution we are now worried about, There are many others—I don't want to burden the record—many great patriots worried, and I think justly were worried about what things may happen. But I give you this as a sort of a warning that any time there is something new, people with imaginations will come up and say, "My heavens, if we give the law-enforcing agencies the right to tap wires, we will all just go to pieces." But the record of 20 years of operation under that clearly proves that that is not true.

On the other hand, you see, as Mr. Dash testified, when you get in areas like California, where they have no statutes as we do in New York, where we are restricted under law, and are very careful not to abuse the right to get the orders, the law-enforcing agencies get private people, to tap wires. There is no control and nobody knows what is going on, which is really a chaotic state and really may lead to tyranny rather than where the thing is properly controlled under the law as in my State.

For example, one of our leading newspapers in New York every once in a while would write an editorial about this "dirty business" of wiretapping.

I called up the editor of the New York Times. I said, do you know the facts? Do you know what the situation is; how important it is to law enforcement?

I went and spent a couple of hours with one of their editors and I am glad to say that they published an editorial soon thereafter in which they said wiretapping is a dirty business, but so is narcotics and so is murder and labor racketeering. In this modern world it doesn't make sense to say to the district attorney, "You keep on with your

horse-and-buggy system; don't you use automobiles and modern devices." They realized that law-enforcement agencies must be given the modern tools to fight the type of criminals we meet up with today who use airplanes to transport narcotics, who use every method that is known to science to commit crime. I respectfully submit, to me it doesn't make sense to say to the district attorney: "No, you can't use modern devices to run down crime."

Now, this is something that has been close to me and I have woried about this a good deal, and district attorneys have, too, and some time ago I wrote an article—I am sorry I didn't bring it with me—I wrote an article for the Harvard Law Record.

(Following is the article by Mr. Silver:)

[Harvard Law Record, copyright 1958, Harvard Law School Record, Inc., Feb. 27, 1958]

LEGALIZED WIRETAPPING NECESSARY TO COMBAT STREAMLINED EFFICIENCY OF ORGANIZED CRIME

(By Edward S. Silver)

There is a great deal of fuzzy thinking about the "dirty business" of wiretapping that sorely needs clarification. Laymen, as well as lawyers, feel a lift when they throw the cloak of Justices Holmes and Brandeis about them, and brand wiretapping as "dirty business." When they do so it is obvious that they did not read the *Olmstead* case (277 U. S. 438 (1928)).

The *Olmstead* case involved illegal wiretapping by Federal prohibition agents in the State of Washington, where wiretapping was declared to be a crime by a specific statute. What both great judges said was that law-enforcing agents should not be permitted to violate the laws even if it suc-

ceeds in convicting criminals. This is what Mr. Justice Holmes said (p. 469), "* * * I think, as Mr. Justice Brandeis says, that, apart from the Constitution, the Government ought not to use evidence obtained, and *only obtainable, by a criminal act* * * *."

Later, again governed by his distaste for evidence procured by law officers while violating a specific statute, he said (p. 471), "But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence *obtained by crime of the officers of the law.*"

Understanding now the clear and only basis for Justice Holmes' dissent, we can put the words "dirty business" in the correct light. I quote the Justice (p. 470), "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. *If the existing code does not permit* district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

There are those who like to consider themeselves as "liberals," whatever that word really means. There is a feeling among those "liberals" that, to come within the aura of that term, they must be against wiretapping without thinking clearly on the question of whether the wiretapping is done according to law or, as in the *Olmstead* case, in violation of the law. Nor do they address themselves to whether wiretapping is or is not necessary in the present-day fight against crime. One can well cite Mr. Justice Brandeis in the *Olmstead* case at this point where he says (pp. 473-474) "But 'time works changes, brings into existence new conditions and purposes'."

I speak for the great majority of prosecutors, who are not only ardent advocates of civil rights, but do something about it.

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It is very important to point out that the wiretapping controversy is not between those who cherish civil liberties and those who are indifferent to them. Indeed the record shows that the district attorneys are alert to protect civil rights, indeed the civil rights of those who are charged with crime. It is they who are generally in greatest need of that protection.

Let me list some bills which the New York District Attorneys' Association, *not* bar association or civil liberties group, advocated and introduced in the New York State Legislature to protect the rights of defendants:

1. Legislation to provide (at the cost of the State, on a court order) indigent persons with daily copy of testimony and the cost of expert witnesses, when needed, in preparation of their defense;

2. Legislation to provide, in crimes where a second offense makes it a felony, a procedure that the prior conviction is not disclosed to the jury. (As the law is now, it is contained in the indictment and read to the jury, and we consider it unfair to the defendant);

3. Legislation to provide that, where a judgment of conviction is vacated and a sentence is thereafter imposed for a lesser term than the original sentence, any time spent by the person under the original sentence be credited to the term of any other sentence which the defendant may currently be serving. (This is not the law now);

4. Legislation making it a crime for one who fails to appear in court when the defendant is paroled in his own custody or in that of his attorney. (Such a law would enable the district attorney to parole such persons and thus not put them to the cost of procuring bail bonds for their freedom pending trial.)

It should be made clear, too, that district attorneys are not in favor of granting any law-enforcing agency the right to tap wires without a court order.

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TESTIMONY

On April 19, 1955, I testified before the Judiciary Committee of the House of Representatives. (See hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., p. 97, etc.) In 1954, in a letter to a Senate committee looking into the wiretapping problem, I wrote to the same effect. I quote the parts dealing with our attitude not to permit wiretapping without a court order:

"I understand that the Attorney General does not favor a provision in the proposed bill requiring a court order, based on a showing of reasonable cause, authorizing the tap. As the district attorney in the second-largest county in the country I resort quite frequently (about 40 to 50 times a year) to wiretapping in our fight against crime. Under our State statute, I am required to get a court order and I welcome it as a reasonable restraint.

"Power is a heady thing, as Mr. Justice Jackson said in *McDonald* v. *United States* (335 U. S. 451, 455-456 (1948)). Just preceding that wise observation, he remarked, 'So that an objective mind might weigh the need * * * the right of privacy was deemed too precious to entrust to the detection of crime and the arrest of criminals.'

"Indeed, when we think we desire to tap a wire we can have the order and affidavit ready long before we have our setting in order. We have never found the necessity to get an order an obstacle.

"As a district attorney, I must not forget that at times in the zealousness to solve a crime I might be tempted to thrust aside protective procedures that have come down to us as a result of many hard fought battles. Four centuries ago Lord Coke (*Second Institutes* (1656) 48) said:

"'Every oppression against law, by colour of any usurped authority is a kinde of destruction * * * and it is the worst oppression that is done by the colour of justice.'

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"I want to say that I strongly favor the Attorney General having the power to tap wires in his fight against subversives. We must get the modern tools to fight those who use the modern tools for their nefarious purposes. Yet, with the necessary power should go the objective view of the court in granting an order permitting a tap."

At this point it might be well to state, too, that the district attorneys in New York State advocated and wrote the law passed by the New York State Legislature in the 1957 session making it a felony punishable by not more than 2 years for any law enforcing agent to tap a wire without a court order. (See New York Code of Criminal Procedure, sec. 813-b.)

ENACTMENTS

Let me quote the New York State constitution provisions and pertinent part of the enabling statute which permits wiretapping by court order:

"*New York State Constitution, Article 1, Section 12*

* * * The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by constitutional convention of 1938; approved by the people November 8, 1938.

"*Code of Criminal Procedure, Section 813a*

"An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York, upon oath or affirmation of a district

attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded, and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine, on oath, the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same" (added L., 1942, c. 924, effective May 23, 1942; as amended L. 1957, c. 879, Sec. 1. eff. July 1, 1957).

There is a great deal of careless comment on the evils of wiretapping. One of the most glaring examples is a statement appearing in a book entitled "An Almanac of Liberty" by Mr. Justice Douglas of the U. S. Supreme Court, I quote from page 355 of this book:

"During 1952, there were in New York City alone at least 58,000 orders issued which allowed wiretapping—over 150 a day every day in the year. The New York system has in

practice been oppressive; it has been used as the means whereby police have obtained guarded confidences of people and used the information for corrupt purposes."

What were the facts? In 1952 all 5 district attorneys in New York City and the police department procured a total of 480 orders—less than 1 percent of what Mr. Justice Douglas asserted. Here is the breakdown:

New York County	60
Kings County	54
Bronx County	14
Queens County	12
Richmond County	2
New York Police Department	338
Total	480

While we are on statistics, may I say that in connection with an inquiry made by a committee of the New York State Legislature figures were gathered on the number of wiretap orders procured by all the district attorneys in the State of New York. Sixty-one of sixty-two counties reported for the 5-year period, 1950 through 1954. These counties account for a population of 14,590,806 (total population, 1950 census, is 14,830,192). For the 5 years the total number of wiretap orders procured was 2,394, or an average of 479 a year, for 61 district attorneys covering a population of over 14½ million people.

Prudence Displayed

Surely it can be said that this power is used with care and restraint.

There are those who, with vivid imagination conjure up dire consequences that will result from the power to tap wires with a court order. Twenty years of experience in New York State show that facts are more reliable than fiction.

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It is most interesting and in a sense amusing when one reads in the year 1958 the debates by the Delegates on our Constitution in 1787. They put one in mind of those who now beat their own breasts and issue dark prophecies about our liberties if wiretapping by court order were permitted.

Patrick Henry is often quoted, approvingly, for "Give me liberty or give me death," but listen to him as a Delegate from Virginia oppose the Constitution: "I would rather infinitely have a king, lords, and commons, than a government so replete with such insupportable edicts."

A Delaware Delegate said: "We are told that although 3 large States form a majority of the people of the 13, yet these 3 States will never do harm to the rest of the States. Gentlemen, I do not believe you."

Why do we need this right to tap wires with court order? Simply, to fight crime—modern crime—organized crime. Where is the sense or logic to say that those engaged in crime may use the telephone in furtherance of their iniquitous operations, and they do, without let or interference?

Federal judge and former Secretary of War, Robert P. Patterson, speaking on the subject of organized crime before the American Bar Association on September 19, 1951, put it well when he said, in part:

"The underworld of today would rate Jesse James as a small-fry amateur. Crime has become big business, with campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations, and the rest. Advantage has been taken of the most modern methods in business organization, *swift communications*, swift transportation. Advantage has also been taken of lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the times we are living in."

Further, in the same address, he said:

"In my opinion there is pressing need also for Congress to legalize the interception of telephone communications—wiretapping if you will—by Federal enforcement officers. Federal officers, as matters stand now, have no such power and evidence so obtained is not admissible in the Federal courts. Their present inability is a crowning mercy to professional lawbreakers. If we are in dead earnest in insisting that organized crime be defeated, we should lose no time in putting this powerful weapon into the hands of the officers we depend on to do the necessary work. *Experience in the States where interception of telephone talks by law officers is allowed proves that the liberties of decent citizens have been in no way interfered with or injured.*"

What must be understood and understood most clearly is that this is a right not given to the district attorneys, but rather to the people, and that the district attorneys are their agents who have sworn to carry out their obligation to the people.

Wiretapping a Necessity

All the district attorneys of New York State, and all district attorneys that I have come in contact with in the national association, feel most strongly that wiretapping is absolutely necessary if they are to be able to cope with the modern criminal.

Does the public wish this right taken from its servants in this fight against crime? We believe it does not.

On December 9, 1957, the Supreme Court in *Benanti* v. *United States* (355 U.S. 96), though strictly speaking obiter, declared that even in a State like New York, the interception and divulgence of a telephone communication is a violation of section 605 of the Federal Communications Act (1934). This decision is considered a serious blow to law enforcement, particularly in the fight against organized crime.

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There has now been introduced in the U.S. Senate a bill (S. 3013) to amend section 605 to authorize certain communications to be intercepted in compliance with State law and for other purposes, which would except from the operation of section 605, FCA, district attorneys and law enforcing agencies that operate under statutes permitting wiretapping by court order, " * * * if such interception was made after determination by a court of such State that probable cause existed for belief that such interception might disclose evidence of the commission of a crime." It is hoped Congress will understand the importanee and urgency of this bill and move it to a successful passage with all speed.

McClellan Bill

The sponsors of this bill were Senators McClellan, Ives, Ervin, Mundt, Goldwater, and Curtis. In a statement on the floor of the Senate, Senator McClellan in behalf of the bill and his sponsoring colleagues said in part:

"As chairman of the Senate select committee investigating into improper activities in the field of labor and management, and as a member of the Judiciary Committee, I am cognizant of the problems facing prosecutors and enforcement agencies in their conscientious efforts to eliminate crime and to punish the criminals, particularly the organized criminal syndicate rings engaged in widespread criminal rackets, such as labor racketeering, narcotics, bribery, and extortion rings.

"The detection, investigation, and prosecution of crime, particularly organized crime, will be seriously handicapped and weakened. In many cases prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies.

" * * * Congress has never intended to permit the criminal to use the means of modern communication with im-

punity by enjoining law-enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and * * * grant these criminals a 'privileged sanctuary.'

"* * * in the field of criminal detection and prosecution, the law-enforcement agencies are consfantly waging a war against criminals who attack society. To do so effectively, it is necessary and essential to intercept their communications.

"Many States, such as New York State, have enacted laws to enable their enforcement agencies to intercept communications under proper safeguards and to eliminate the dangers of promiscuous and improper use. In New York, for example, the enforcement agencies must apply to the court of highest original jurisdction for a warrant to permit the interceptions. This warrant is only granted when the court is satisfied that reasonable grounds exist that evidence of crimes will be obtained as a result of the wiretap."

* * * * *

Mr. Silver. I say very quietly I went to Harvard Law School. I am, although I am not a Harvard man, I went to City College because I couldn't afford to go to Harvard College—

Senator Hennings. Why do you say "quietly"? Why say it quietly if you went to Harvard Law School? Don't you think people learn any law there?

Mr. Silver. In Harvard? I think that Harvard is the finest law school in the country.

Senator Hennings. I think some people think it is almost as great as a great many others.

Mr. Silver. I am sure there must be one in the State of Missouri that is as equally as good.

Senator Hennings. I think there is more in any law school than any student can learn.

Mr. Silver. I didn't get the question.

Senator Hennings. There is more education in the law available in any law school, accredited law school, than any student can take.

Mr. Silver. I think that's correct.

Senator Hennings. You don't begin to learn much about law until you get out of law school. By the time a lawyer is ready to be taken to his eternal reward, if any, he is still learning about the law.

Mr. Silver. If a man gets to be a U. S. Senator or a district attorney—

Senator Hennings. He never really—

Mr. Silver. He has a chance to pick up some ideas.

Now, this little piece which I wrote for the New York State district attorney's paper, while it is written in a sort of—

Senator Hennings. Did you study under "Bull" Warren or Sammy Williston?

Mr. Silver. I studied criminal law with "Bull" Warren.

People just don't understand what is going to happen if the Congress does not correct the effect of the *Benanti* case.

Organized crime will have a field day.

The least that Congress should do is to amend section 605 of the Federal Communications Act to the effect that it will not be unlawful for law enforcing agencies to tap wires in States like New York State which requires a court order on a sworn statement of reasonableness.

• • • • •

Let me read this little column I wrote about what the effect of the decision will be in law enforcement. This is an imaginary piece, but I think it states the law. It is a telephone conversation between a top racketeer and one of his henchmen. I call the henchman Peanuts and the other is the Boss, so you will know who the characters are in this play:

It is not written like a decision but it sets forth the law.

Peanuts. Lo, Boss, this ez Peanuts.

The Boss. Yeah, hello, did the shipment come in OK?

Peanuts. Sure thing, Boss, 50 horse.

The Boss. What do you mean "50 horse"? I was expecting 50 kilos of heroin. Give it to me straight.

Peanuts. Gee, Boss, dats no way to tak on the phone, you warned me y'self. I • • •

The Boss. Listen, dope, that's old stuff. My mouthpiece told me the bulls aren't allowed to stick their snoots in our private business. It's against the law, y'hear? It's dirty business to do such a thing.

Peanuts. Are you all right, Boss? You ain't cockeyed or something? Are you hittin' the stuff y'self?

The Boss. Look, dope, I'm telling ya. Let 'em listen. The lip tells me and he gets paid to know. The more they listen, the better. It's better'n you think.

Senator Hennings. That means lawyer, sometimes called a shyster or lip.

Mr. Silver. That's right. I thought everybody knew what a lip was.

Senator Hennings. They haven't been where you and I have been.

Mr. Silver (continuing):

It's better'n you think. There's some stuff known like the fruit of the poisoned bush, or something. If they grab the stuff after lis'nen, it's out. They ain' allowed to do such naughty things no more.

Peanuts. Look, Boss, should I come over? I think yuh needs me.

The Boss. Forget it, Peanuts. I'm fine, great—the boys is all with me—forget it—and say—you get another grand for the job you did yesterday. The D.A. will know his canaries can't eat lead—it's bad for their diet. Ha, ha, ha—that's pretty good, what?

Peanuts. OK, if ya says so, ya had me worried there for a bit . . .

The Boss. And listen, I want you should give a couple of yards to the Criminal Liberties Union. Deys the main outfit dat made tappin' a dirty business. Now we got a right to talk 'bout our private business, like good Americans should what the Constitution says they should.

Peanuts. Boss, dat's what I call a good union—is it one of Dio's outfits?

The Boss. I don't care what outfit it is—they earn our t'anks. Take care of it. Ain't you got no 'preciation? Bye, Peanuts, keep your nose clean.

Peanuts. Bye, Boss.

I may have been kidding when I wrote it, but actually that is the effect of the *Benanti* case. In other words, if we should, in violation of the law, listen to people dealing with narcotics or murder or anything else, we not only cannot use the testimony via the taps, but, as you know, the fruits of the poisonous vine as well, anything that develops from that may not be used. If it is shown in preliminary examinations, under the Supreme Court ruling, they have these voir dires when they cross-examine everybody as to was

there wiretapping and what did you learn and what did you find out—the law enforcing agency will just have to give up this very valuable instrument of detecting crime.

Now, one of the things I have heard people say: Isn't there a lot of wiretapping going on about gambling, as if gambling isn't very serious?

When we say gambling, I am not concerned with the fellows getting together in a room or shooting a game of craps, or playing gin rummy. We are talking about gambling in the sense that we prosecutors know it.

At the beginning of this year, in February, February 26, we have a grand jury in session which is looking into the gambling racket, it is called the rackets grand jury—they made a presentment in connection with gambling. The principal thing that we tried to do even though we have recommendations here as to other things, the principal thing that we try to bring home, and I am glad to say that many people have written to me for it, it is getting some slight circulation—I am not going to attempt even to read all of this—I will leave it for the record, but the basic point I wanted to make is this: The basic proposition is that gambling is the heart of organized crime and that is true on a national scale as well. May I quote just a paragraph here:

As brought out by the exposés of the Senate Rackets Committee during the period of May 10, 1950, to May 1, 1951: We have had considerable testimony from persons covering the national scene as well as the local scene; and we are convinced that a tieup between organized crime and gambling ventures is still the most significant fact in the national crime picture, that crime related to gambling and vice are still the seedbed of organized crime, and we consider it our duty, therefore, to call to the attention of this

honorable court the need for a greater public awareness of the deadly seriousness of crime relating to gambling and vice. If this presentment were to bring home not only to the people of this county but to the country at large the true nature of the enemy of society known as organized crime and the fact that it draws its heartblood from gambling, we shall have performed a real public service. We shall have struck a mighty blow at the very heart of the underworld.

Anybody who knows anything about this business knows that all the money, the principal moneys that go into narcotics, loansharking, so-called legitimate business, in competition with truly legitimate business, the money in Las Vegas to build those palatial places, come as a result of gambling, and gambling syndicates.

When people say, "Everybody gambles, it is a natural thing"—I know when we were in law school there was one professor who used to take his glasses off a number of times and we used to have a nickel pool to see who could get closest to the number of times he took his glasses off.

That is one thing. It is another thing to have cutthroats and guerillas controlling gambling over the country and get the money through which they carry on all their nefarious activities.

Senator Hennings. I think you are certainly right.

Mr. Silver. I would like to have this presentment made part of the record in the hope that we can get some legislation later based upon it.

Senator Hennings. Without objection, Mr. Silver's exhibit will be made part of the record.

(The presentment referred to follows:)

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

PRESENTMENT OF THE SECOND ADDITIONAL MARCH 1958 GRAND JURY OF THE COUNTY OF KINGS ON EFFECTIVE MEANS OF COMBATING VIOLATIONS OF LAWS RELATING TO GAMBLING AND POLICE CORRUPTION

To Hon. Hyman Barshay, County Judge, Kings County

On April 28, 1958, this grand jury handed up an interim presentment to Your Honor summarizing the results of our probe to that date.

In that interim presentment we pointed out that some 40 witnesses, including bookmakers and police officers, had testified before us, and that evidence of corruption within the Brooklyn Borough plainclothes squad had been presented to us. Lacking some technical legal proof, we were unable, as a matter of law, to return indictments. In our interim presentment we recommended that this evidence be turned over to the police commissioner for appropriate departmental action. We concluded with the following statement:

"May we point out that the foregoing is but an interim report. Other phases of investigation into gambling and bookmaking in the county of Kings are currently being explored by this grand jury and we respectfully request the permission of this court at a future date to submit a further presentment relating to this phase of our inquiry."

Since that date, this grand jury has continued its investigation into various phases of the enforcement of the laws relating to gambling in the county of Kings. We have heard many additional witnesses, including high-ranking officers of the police department. In addition to our own able police commissioner, Stephen P. Kennedy, who appeared before this grand jury on two occasions, we had the benefit of the experiences and expert opinions of officials from large cities in other parts of our Nation. We heard testimony from police officers and detectives as to the methods of

combating crimes in our jurisdictions. We heard, too, considerable testimony on the subject of the interrelationship between crimes related to gambling on the one hand, and other criminal acts.

As a result of this investigation we have arrived at certain findings and desire to make specific recommendations to this Honorable Court.

The findings are these:

(1) Gambling is the Lifeblood of Organized Crime

Gambling is the very heartbeat of organized crime both on a local and national scale. Strangely enough, this vital finding, which should be apparent to everyone concerned with the problem of law enforcement, is recognized in theory but virtually ignored in practice. We emphasize that this most important finding was arrived at from an exhaustive study of this subject. It is a finding which should be proclaimed throughout the breadth and length of our country and the Nation. All of our other findings and recommendations flow from a proper understanding of this axiom of modern racketeering.

The crimes encompassed by the term "gambling" in this presentment are sinister. The public has been misled as to the true nature of gambling and its serious impact on our body politic, because it is confused with practices which are indulged in at one time or another by a large proportion of the respectable citizens of the community. Almost everyone, at one time or another, has gambled, whether in a private game of cards, at a church bingo, at the parimutuel machines at a racetrack or in some other form. The result has been a public acceptance of gambling as if it were a part of human nature and, therefore, an unimportant offense. This attitude is, in large measure, responsible for the public apathy toward the enforcement of the laws relating to gambling. The public must begin to understand

the crucial difference between criminals engaged in gambling and the indulgence of decent citizens in various types of betting.

From the evidence presented to us, we state categorically that gambling crimes are linked on innumerable occasions with the most obnoxious criminal enterprises known to man. The public may think of the bookmaker in the corner candy store as an innocent betting commissioner operating a legitimate business. We have heard the evidence. We know otherwise. Actually, if you scratch the professional operator of gambling ventures you find the narcotics peddler, the loan shark, the dice game operator, the white slaver, the murderer. Brooklyn has been the scene of a number of unsolved gangland homicides over the past few years. Almost every one of those killings is involved with gambling ventures in one form or another.

In one case where seven leading narcotics dealers were convicted in Kings County last year, six were actively engaged in gambling activities, including bookmaking and policy, which they used as the source of funds for their deadly trade in narcotics. We have heard considerable evidence which indicates that many of these gambling figures have gone into labor rackets and coin-operated machine rackets as well. The very case which was the initial subject of our investigation, involving two men who centered their bookmaking activities at a tavern known as Hugh Casey's Bar & Grill at 600 Flatbush Avenue, in the county of Kings, is an excellent example of the interrelationship of gambling and other criminal ventures. Closely allied with the bookmakers and operating out of the same tavern was a group of loan sharks who financed the bookmakers. These loan sharks also operated dice games. Literally thousands of sets of crooked dice were confiscated in raids upon their homes. Guns were found in or about the dwellings of these loan sharks. Legally intercepted telephone

conversations at the same tavern during the same period showed references to a holdup of a payroll truck in the county of Kings and to a burglary of many thousands of dollars' worth of transistor radios from a Long Island City factory. Evidence showed that those same bookmakers, through the loan sharks, were dealing with the notorious Robillatto, also known as "Johnny Roberts," who was the victim of a recent gangland homicide on Utica Avenue and Kings Highway.

In other homicides, as yet unsolved, the authorities have some evidence from informers and underworld leaks that those homicides, too, were intimately related to organized gambling. Valerino, whose body was picked out of the Narrows, was put to death, according to reliable information, because he held up a dice game without the permission of the "syndicate" boss. The recent gangland convention at Apalachin near the city of Binghamton in the State of New York points out the importance of gambling to the underworld since the overwhelming majority of the conferees at Apalachin have histories of violations of gambling laws and involvement with gambling operations.

The basic proposition that gambling is the heart of organized crime is true on a national scale as well, as brought out by the exposés of the Senate Rackets Committee during the period from May 10, 1950, to May 1, 1951.

We have heard considerable testimony from persons with information covering the national scene as well as the local scene. We are convinced that the tieup between organized crime and gambling ventures is still the most significant fact in the national crime picture; that crimes related to gambling and vice are still the seedbed of organized crime.

We consider it our duty, therefore, to call to the attention of this honorable court the need for a greater public awareness of the deadly seriousness of crimes relating to gambling and vice. If this presentment were to bring home,

not only to the people of this county but to the country at large, the true nature of the enemy of society known as organized crime and the fact that it draws its heartblood from gambling, we shall have performed a real public service. We shall have struck a mighty blow at the very heart of the underworld.

(2) Gambling Crimes Breed Corruption and Contempt For Law Enforcement

It is understandable from the first finding discussed above why official corruption is present most often in connection with the enforcement of the laws relating to gambling and vice than in any other area. This is true because of the vast profits derived from these enterprises and because of the continuing nature of the crime.

Repeatedly, going back over many decades, exposes of police corruption, not only in this country but in cities throughout the United States, show that the overwhelming majority of cases of police corruption arise in squads charged with the enforcement of laws relating to gambling and vice. In this county, an illustrious grand jury empaneled in December 1949, worked for 4 years on this very subject. The grand jury exposed the "malignant influence of professional bookmakers in contaminating vice squad police officers." It brought about some constructive reforms, including the establishment of the Rackets Bureau of the Kings County District Attorney's Office on a permanent basis. In this regard we point out that testimony before us from high police sources shows that the Rackets Bureau of the Kings County District Attorney's Office is the single, most effective weapon in existence in this county for combating police corruption.

Unfortunately, corruption of this type still exists, as we have learned from the evidence adduced before us. This

corruption produces disrespect for law and order and disrespect for those charged with law enforcement.

We need not relate the details of an indictment we filed on February 24, 1959, with Your Honor involving a deputy police inspector and two officers of the morals squad.

This disrespect for law and order poisons the minds of many of our young people. It produces a contempt on their part for the law and those charged with enforcing it. It leads them to deride decency and good conduct and thus promotes juvenile delinquency.

(3) The Action of Our Courts Reflects the Lack of Understanding of the Real Nature of Gambling Crimes

We find that the apathy of the public toward crimes related to gambling and vice is reflected by the courts. In the final presentment of the holdover December 1949 grand jury of this county, the point was emphasized that:

"* * * wholesale gambling has thrived in large part, because such courts have not done their duty. They have, on the contrary, conferred upon the bookmakers a sense of impunity—of immunity from the sanctions of the law—that will take a very great amount of undoing. We have had before us the criminal records of numbers of bookmakers who have been convicted time and time again—some of them up to 40 times—without ever being required to serve a day in jail."

Unfortunately, there has not been a change in the attitude of the courts. Repeatedly we have seen cases of bookmakers with numerous prior convictions both for gambling and for crimes of violence, who have escaped jail sentences. During the calendar year of 1957, in Kings County, of 157 convicted bookmakers, only 1 received a jail sentence. In 1956, of 145 bookmaking convictions, not 1 went to jail. This is true not only in this county but in other

counties as well, where a jail sentence is an unusual occurrence. This condition is part of the disease of "apathy" which exists in many other jurisdictions, where the enforcement authorities have complained to us of the cavalier attitude of the courts toward bookmakers.

It is plain to see that the courts dealing with this crime do not comprehend the seriousness of the crimes involved and their implications with regard to the public welfare. The bookmakers and policy bankers consider these court proceedings which result so often in fines as merely part of the cost of doing business—as a sort of "license" fee.

Bookmakers and policy operators are soft livers. Nothing, but nothing like a jail sentence could teach them that violating our laws is serious. As the police often put it "these bums don't like jail."

* * * * *

CONCLUSION

It is our opinion that the prompt and effective implementation of these recommendations will bring substantial improvement in the work of stamping out gambling. Relentless war must be carried on against organized crime. This war is a continuing war. We can turn the tide only by eteral vigilance and relentless prosecution of our laws. Only by such measures can we strike a truly devastating blow against gambling—the heartblood of organized crime.

Dated: Brooklyn, N. Y., February 26, 1959.

Respectfully submitted.

SECOND ADDITIONAL GRAND JURY OF THE COUNTY OF KINGS, FOR THE MARCH 1958 TERM,

By RUDY WEISSBRATTEN, *Foreman.*

Attest:

HENRIETTA V. CARTER, *Secretary.*

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Mr. Silver. I think you know that the New York State district attorney and the National District Attorneys Association both have passed resolutions with regard to giving the law enforcing agencies under proper restriction the right to tap wires in furtherance of fighting crime, which is very serious.

So I will give you this one resolution of the National Association of County Prosecuting Attorneys in connection with wiretapping.

The front page is just a communication sheet; but you pick the part of it you think is pertinent for the record.

I submit also for the record a statement issued by the executive committee of the New York State District Attorneys Association in connection with the *Benanti* decision.

(The documents referred to follow:)

RESOLUTION NO. 1—FEDERAL LEGISLATION TO PERMIT STATE LAWS AUTHORIZING WIRETAPPING BY LAW ENFORCEMENT OFFICERS

The Supreme Court of the United States has recently interpreted section 605 of the Federal Communications Act to preclude the State from enacting legislation which would legalize wiretapping by State law enforcement officers. Section 605 of the Federal Communications Act (47 U. S. C., sec. 605) provides:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *."

In *Benanti* v. *United States* (78 Sup. Ct. 155, decided Dec. 9, 1957), the Court held that evidence obtained by wiretap-

ping by State officers is inadmissible in a Federal criminal prosecution. In this decision the Court said "we find that Congress, setting out a prohibition in plain terms, did not mean to allow State legislation which would contradict that section and that policy."

This interpretation of section 605 deprives State prosecutors and other law enforcement officers of one of the most effective weapons in combating serious crimes and organized criminal activity. In many instances the telephone is the usual means by which persons engaged in kidnaping, extortion and racketeering convey threats and information. This criminal activity can be effectively countered only through the use of wiretapping. In some instances wiretapping will serve to protect the lives and property of persons by providing information concerning plans for the commission of crime.

To remedy the present situation, Senate bill 3013 (85th Cong., 2d sess., Jan. 16, 1958) has been introduced by Senators McClellan, Ives, Ervin, Mundt, Goldwater, and Curtis. The bill provides that "Section 605 shall not apply to * * * (b) the interception, by any law enforcement officer or agency of any State (or any political subdivision thereof) in compliance with the provisions of any statute of such State, of any wire or radio communication, or the divulgence in any proceeding in any court of such State, of the existence, contents, substance, purport, effect, or meaning of any communication so intercepted, if such interception was made after determination by a court of such State that probable cause existed for belief that such interception might disclose evidence of the commission of a crime."

This association expressed its approval of Senate bill 3013 at the 1958 midwinter meeting at Las Vegas, Nev., and directed the president of the association to bring its approval to the attention of the appropriate committees of the Congress. The bill has not been passed and the need for immediate action is urgent. Now, therefore, be it.

Testimony of Hon. Edward S. Silver Before Senate Subcommittee on Constitutional Rights of Committee on the Judiciary

Resolved, That the National Association of County and Prosecuting Attorneys at the 1958 convention at Atlantic City, N. J., approves Senate bill 3013 and urges its immediate passage by Congress, and that the president of this association be directed to bring this resolution to the attention of the chairman of the U. S. Senate Committee on Interstate and Foreign Commerce and to the attention of the chairman of the U. S. House of Representatives Committee on the Judiciary; and further that the president of this association request the appropriate committees of Congress for permission to have various members of this association appear to testify in favor of this legislation.

Dated this 30th day of July 1958.

NATIONAL ASSOCIATION OF COUNTY AND PROSECUTING ATTORNEYS,

By J. ST. CLAIR FAVROT, *President*

Attest:

VINCENT P. KEUPER, *Secretary.*

STATEMENT ISSUED AT A MEETING OF THE EXECUTIVE COMMITTEE OF THE NEW YORK DISTRICT ATTORNEY'S ASSOCIATION, IN GARDEN CITY, LONG ISLAND, N. Y., ON DECEMBER 12, 1957, IN REFERENCE TO A DECISION OF THE U. S. SUPREME COURT IN UNITED STATES V. BENANTI, ON DECEMBER 9, 1957

In its recent decision in *United States* v. *Benanti*, the Supreme Court of the United States has declared that section 605 of the Federal Communications Act, rendering it a crime to intercept telephone conversations and divulge their contents, applies to telephone conversations intercepted by State as well as Federal officials. The effect of this decision, apparently, is to raise a doubt concerning the validity of New York legislation empowering State law

enforcement officers, pursuant to court order and under a procedure providing ample safeguards against abuses, to engage in wiretapping for the purpose of obtaining evidence of crime. Since this decision appears to deprive district attorneys and law enforcement agencies of one of their most effective weapons in combating criminal activity, we feel that certain observations are in order.

No one having any substantial experience in the field of law enforcement could entertain the slightest doubt that authorized wiretapping is an essential weapon in the fight against modern, organized crime. Without it, district attorneys and the police become virtually helpless in numerous instances where dangerous and nefarious activity is conducted by ringleaders in such fashion that their detection and apprehension becomes impossible in the absence of this tool. It is no exaggeration to state that the outlawing of wiretapping by law enforcement officials represents an incalculable boon to the underworld.

As it has operated in this State, legalized wiretapping has never produced private or public injustices of the sort envisioned by alarmists unfamiliar with the procedure employed. In fact, a joint legislative committee of our State legislature, after a thorough study of wiretapping operations in New York State, explicitly declared that they had found no abuse whatever by any district attorney in the utilization of our wiretapping procedures.

The basis of the recent Benanti opinion, so far as here pertinent, is that, in enacting section 605 of the Federal Communications Act, the congressional intention was to go beyond regulation of the conduct of Federal employees and to extend its criminal application to that of State employees as well, even though acting pursuant to the constitution and statutes of their State. Without detailing the various legal arguments to the contrary, it seems in order to point out that the actions of Federal legislators during the past few

years hardly support the proposition that such was the congressional intent.

Indeed, numerous congressional committees, devoted to exposing the extent of labor racketeering, narcotics traffic, juvenile delinquency, and other deleterious influences in this country, have consistently relied upon information given to them by State prosecutors, which information, as they well knew, was largely procured through the instrumentality of telephonic interception. It is safe to say that 100 or more Senators and Representatives have participated in such hearings where the nefarious machinations of criminal elements were divulged to the public through the medium of legalized wiretapping. It is also safe to state that not one of these legislators, nor any other Senator or Representative from either side of his House, has ever raised his voice in protest or objection to the use of such valuable information. Under these circumstances, among others, we find it difficult to believe that the Congress, in enacting section 605 of the Communications Act, intended to render the use of such interceptions a criminal offense.

In the light of the foregoing, we, in the arduous battle against racketeering and crime, necessarily importune the Congress to amend section 605 to exempt State officials from its operation wherever the particular State authorizes its law enforcement bodies to intercept and divulge telephonic communications pursuant to its constitution and statutes, with due regard for the safety of its citizens.

Present: Edward S. Silver, Kings County, president; T. Paul Kane, Schoharie County, first vice president; Abraham Isseks, Orange County, second vice president; Henry P. DeVine, Nassau County, treasurer; Richard G. Denzer, New York County, secretary; Frank S. Hogan, New York County; John M. Braisted, Jr., Richmond County; Paul H. McCabe, Chemung County; Harry L. Rosenthal, Monroe County; John F. Dwyer, Erie County; Raymond C. Baratta, Dutchess County; Frank A. Gulotta, Nassau County.

Mr. Silver. In conclusion, Mr. Chairman, I know you have been very patient here for many hours.

Senator Hennings. Mr. Silver, we don't want in any wise to restrain or limit your very splendid testimony. You have been here a number of hours, too. We are going to be here, very likely, until late tonight. We are going to be here, one place or the other, so we are glad to hear from you, sir, as fully as you wish.

Mr. Silver. What I wanted to say is this: Basically, what I am trying to bring home to the committee is this: One, that the district attorneys of our country are people who are vitally interested and have shown by their actions, not just by their words, that we understand what rights of the people are; that we have introduced legislation to protect defendants' rights, and that we have always been on the side of being concerned with the Bill of Rights and see that it is in no way violated, and nobody is in a better position than we are to know how sorely that is needed in every State of our Union.

Secondly, that most of the talk that goes on with regard to wire-tapping is with regard to people who wiretap who are not law-enforcing agencies and not charged with the responsibility of running down a crime.

As to that, the district attorneys have been vigorous, have been strong in trying to get the most dire penalties in connection with that sort of activity; that we have not advocated giving district attorneys carte blanche right to tap wires just because he feels like it.

We felt that the district attorney should and does welcome some reasonable restraint on his own judgment, be-

cause he might be so zealous about trying to convict somebody that he might go overboard, that he ought to have some restraining hand of the court who sits back and says, "What are you getting excited about? I will give you the order, or I won't give you the order."

I think the record shows where we have had strong laws restricting wiretapping, where we have operated for 20 years—people even investigated us—the State legislature fully and clearly said we have never violated the right.

At the present time, law enforcement is in a precarious position as a result of the *Benanti* case, and I want to make it clear that I am not leveling any criticism at the Supreme Court. I bow with deep respect to its decision. I am not here to say that therefore we should pass laws that stop this and stop the others. I am not talking about that at all. I am saying here is the decision; we recognize it as the supreme law of the land.

I say to the Senate and to the House that I think they ought to come to the help of the district attorneys of this country, whatever their names may be, county solicitors or prosecutors or county attorneys; that we need this right to fight crime.

We have said it, and we say it again, that if you take away from us this instrument, not only will we feel it strongly, but the people whom we represent will have taken from them an instrument which is necessary in the enforcement of laws against crime.

In New York State, particularly New York City, it has been of tremendous value, not only with regard to detecting crime, but it is our considered feeling it has been a

restraint on criminal activities. They do get careless. The telephone is such a convenient instrument for criminal activities. We have found that even though they might feel that their wires are being tapped, yet after a half dozen fellows call up, one fellow will say, "Well, we will meet in the usual place in Broadway," and you don't know where it is—another fellow will say, "Is it 1:47 as usual?" —and the next fellow will give you the time and with a little patience you generally get to know where the meetings are, and you can watch people and learn about them. At least you get vital leads to run down criminals.

So I say to you as humbly as I know how, as a law-enforcing agent, I hope that it will not be too long before Congress considers a law, at least a limited law, taking out of the operation of 605 those areas, those States that have the type of laws that New York State has where the law-enforcing agent can tap wires for a limited time on a showing of reasonable grounds that he has the basic evidence to believe that he will get evidence of crime if he taps a wire under the restraints which I have talked about under the constitution of New York State and section 813A of our Code of Criminal Procedure.

I think I have mentioned the fact that we do not countenance illegal wiretapping. I think I said that in the early part of this year we convicted two policemen who tapped wires without court order. There is no excuse for that.

Senator Carroll. Let me ask, where you have had this for 20 years in New York—I used to be a district attorney, too, many years ago, and I have had to meet this very problem in our State—evidence, no matter how acquired,

illegally or not, is admissible. It is not the rule today in the Federal system. This has been changed since the *Weeks* case, 40 years ago. I don't know what the rule is in New York.

Let me ask you this question.

Where you have had this experience for 20 years, do you believe there is illegal wiretapping going on in your own State, in your own county?

Mr. Silver. In my own county? I can talk for my own office.

Senator Carroll. I am not speaking about your office. I am not speaking about district attorneys. Your general impression, that is what we are trying to get.

Mr. Silver. I would say this, as my opinion, I have never made an investigation about it—it is my opinion that private persons, either because of some domestic-relations problem, business, whatever it may be, do resort to illegal wiretapping. I don't know how widespread it is, because I really don't know.

Let me say this about district attorneys. I say most emphatically that no district attorney would tap a wire without a proper order. As for the police, in view of the fact that they can get an order if they are entitled to it and what I know about the police commissioners the instances of wiretapping without an order are rare.

Where it is being done without the court order by a police officer, that is being done by someone who is not really interested in law enforcement anyhow.

If you need a court order, if he wanted to shake somebody down, he wouldn't get a court order, so you are dealing

again with a person who is not engaged in law enforcement. You are dealing with a person who is a law violator.

Senator Carroll: The reason I asked the question, Mr. Chairman, Kings County, I think, is either the first or the second most populated place in the United States.

Senator Hennings. Second.

Senator Carroll. You have a shifting population there. Your problems must be enormous—not that you are not a law-abiding people, but in the nature of things in your area. The reason I ask this question, is that you have operated for 20 years. You can go and get a court order. I assume when you get the court order the evidence is admissible?

Mr. Silver. It would be admissible even if we didn't.

Senator Carroll. Same applies in New York as in Colorado.

Mr. Silver. In the *DeFore* case (242 N. Y. 13; 150 N. E. 585)—but within the last month, since the *Benanti* decision came down, the admissibility of wiretap evidence was challenged and the court of appeals has reaffirmed the *DeFore* case and *Schwartz* v. *Texas* (344 U. S. 199), even though it may or may not be a violation of any law, it is still admissible. That case is *People* v. *Variano* (5 N. Y. 2d 391 (April 1959)).

Last year, the legislature introduced a bill making illegally procured wiretapping inadmissible, just limiting it to wiretapping.

The District Attorney's Association opposed the bill, not on the ground that we wanted illegally procured wiretapping evidence introduced, but because the bill wasn't clear and was cumbersome.

Memorandum to the Governor showed if they would clear up, write the bill a bit clearer, so it would be understood, that it could not be used as an instrument to discover evidence in advance, even where an order was procured; we would not oppose it. May I try to make myself a bit clearer.

In other words, if a statute was passed just saying that illegally procured wiretapping may not be admissible, a lawyer under that statute might say, even though you got an order, you did not get a legal order. The judge should not have granted you the order because you really didn't give him enough evidence on which to base reasonableness. They therefore could attack even in a situation where we got the order. Even if defense counsel felt we got a proper order they would start a voir dire proceeding to find out if we did have wiretapping, what was the wiretapping and who wiretapped, and so forth. The judge who signed the order could be subpoenaed and questioned about the basis for his signing the order.

So I want to say that the district attorneys' objection to the bill wasn't that we wanted the right to introduce illegally procured wiretap evidence, but we wanted a clarification of the bill. Let us keep in mind that defense counsel are not always as pure as the driven snow.

Senator Carroll. I started to talk about the size of your county, the number of people. I agree with what you say about organized crime. It is a real problem. This is what disturbs many lawyers: what to do about this? On the one hand you have the folks who are charged with enforcing criminal laws and these big syndicates and these big gangs that are operating.

This is on the one hand. On the other hand they have a real concern about individual liberties not only in the field of law enforcement but in the industrial field, the field of business relations, the labor and management field. Now we learn that police or private citizens can lease a whole wire and go into a home. I am not talking about district attorneys, but the question is: When you place the stamp of approval on one practice, does this extend to the other areas?

In my own area—I come from Denver—I was district attorney many years ago. We had the same problem. Perhaps Colorado district attorneys may wiretap. Our office operates much like yours. I had police officers working in my office.

I didn't wiretap. At that time it wasn't necessary. But changes have come. Syndicates move all over the country. We now have an intelligence squad in the county which will be notified by another city that so and so is coming into your town. They watch and they began moving into Las Vegas, or moving into some other place, but this is a real question: How can you place the stamp of legal approval on evidence that is acquired through wiretapping? There is a growing body of opinion favoring the watering down of the constitutional provisions of the fourth amendment on illegal search and seizure.

Many people walk out of the courtroom who are guilty when there is a motion to suppress evidence illegally obtained.

There is a body of opinion that think the fourth amendment should be mitigated.

In a changing society, with the enormous problems, the question is: Where do you draw the line?

Mr. Silver. I tell you where I draw the line. I would make every possible restriction that anybody can conceive against private people tapping. I would be glad to sit with any committee to help draw such laws. I am sure the district attorneys, State and national, would like to sit down with the committee and try to frame legislation to make the use of wiretapping by the private individuals a serious offense, as serious as you do make or dare make it in a statute, but I cannot understand—it hasn't in New York, where we have had the right, where we district attorneys have abused it, where it has been effective in the use of fighting organized crime and serious crimes—why take it away from the law enforcing agents who indicate by their attitude and point of view toward individual liberty that they use it very carefully, use it for the job that they have been elected to do, and why be concerned that if you say to the district attorney, you may use this under certain restrictive regulations for the enforcement of crime, for myself, at the moment at least, I don't understand why that should give any encouragement to any industrialist or laborite or private detective to say that the district attorney can do it under certain restrictions so that makes it easy for me to do. One has nothing to do with the other.

Senator Carroll. I have a very strong feeling that Federal enforcement agencies ought to strictly adhere to the Constitution.

Perhaps in State laws we shouldn't go too far to interfere with methods of presentation, gathering evidence, and prosecuting. Let each State function within constitutional

bounds, but it has never been held that it is denial of due process for States to act in such manner.

I don't understand all about this *Benanti* decision. I notice it says, whether by State or Federal agents, but you have just indicated that your Court of Appeals in New York has not thrown out evidence.

Mr. Silver. Let me show you, Senator, the very terrible position which I and my colleagues find ourselves in.

At the present time, I understand the Attorney General's view is this, that Congress has as yet, and he said that in the hearing before some Senate committee—Congress has as yet not had an opportunity to express itself with its desires concerning the *Benanti* case and State law enforcing agencies.

Therefore, we are now under sort of a truce.

But if Congress doesn't act soon, I think that the Attorney General will be compelled as a law enforcing agent, as a man of integrity, to say to me: "Mr. Silver—or Mr. Hogan or anybody else—if you tap wires and divulge the information you are violating the Federal law." I don't want to know about some racketeer to know what he is doing. I have no desire to satisfy my curiosity. I want to use the evidence to convict him. If I do that, the New York Court of Appeals will say sure, Mr. Silver, you may introduce that evidence and convict this defendant, but that is not going to stop the U. S. attorney from issuing a warrant against you for violating section 605 of the Communications Act. Congress must do something about it.

I, as a law enforcing agent, may not think I am dealing in dirty business. I would then find myself in the position

where I am thwarting the laws of the United States. I don't think any district attorney, and indeed he should not, is going to prosecute anyone and risk going to jail for it. Nobody is going to do that.

Senator Carroll. My point is this, and I don't say that we should do this, but just expressing myself in a very general way, supposing that that were modified to leave the State law as it was before and leave the Federal law as we think some, some of us think, it ought to be. Would that interfere then?

Mr. Silver. No, it would not.

Senator Carroll. So you are not talking about the *Rigmanti* decision in its application to Federal agents but its restriction on State agents?

Mr. Silver. In the previous Congress there was a bill, S. 3031, which was a very simple bill. It didn't go into anybody else having the right to tap, Federal or anybody else. It simply said that section 605 shall not make it unlawful for a district attorney in the State of New York who can get a court order on an affidavit of reasonableness—in other words, all we are trying to do is to say, please let us continue as we have before in New York State or such other States as have this type of legislation.

Senator Carroll. One more observation concerning Federal officers only. If we are not careful in drafting this statute and purport to grant permission to Federal officers to go into private homes and plants listening or wiretapping devices, may we not run afoul of the fourth amendment against illegal searches and seizures. What would be the difference between unlawful entry to plant a bug and unlawful entry for other purposes?

Mr. Silver. The Federal Government doesn't have the right now and wouldn't have if you passed a statute like S. 3013. It wouldn't enlarge their powers one bit. They still could not, under the decisions of the Supreme Court even if you permitted the State of New York to tap wires as they have in the past, that testimony still could not be introduced in a Federal case even if it were based on the evidence gotten by the State and under a wiretap order.

Senator Carroll. This raises the question of the *Bartkus* case. There Federal prosecutors missed a conviction in Federal court and moved it into the State court.

This raised the question of double jeopardy, which was discounted, but there was a great hue and outcry from some of the leading figures of the Nation on this thing and the Attorney General had to warn his district attorneys, his Federal district attorneys throughout the Nation, to be very careful of his practice.

All this involves again the question of the use of evidence. It is a very difficult field.

So, believe me, it is not the do-gooders and sweetness and light boys who are concerned with this issue. There are some very deep constitutional questions involved that strike clear into the marrow of our system.

The question, and if I were district attorney I know exactly what you are talking about—you have got a job to do. You have to meet modern conditions with syndicates and organized crime that have got money. They can maneuver and they can corrupt and ship in narcotics. It is international in scope—how not to tie your hands.

This is one of the great problems, too.

In the Federal Government, for example, if we took all this off when they talk—I think you made some expression about the right of the Attorney General, somebody, to investigate subversives—in this concept, everybody may be looked upon as a subversive. They could tap the telephone into my house.

This incident I told you about rose in Colorado where a wire chief made a proposition to a certain member of my staff. He could give me a contact with any telephone in Denver. This is the sort of thing, when we talk about wire, we are not talking about a single telephone, we are talking about a wire that fans into something.

Mr. Silver. A suggestion made to somebody in your staff, by somebody not in law enforcement. It was somebody thinking you would like this information.

I am talking about the very restricted right which does not affect what the Federal law enforcing agencies do at all. In other words, if 3013, which has now another number, were passed by the present Congress and signed by the President, the Federal people would have no more right to do anything more than they have at this minute. They are not going to enlarge their right by giving us 3013. All you do by 3013, you say if New York State or Illinois or California wishes to pass a bill in California or New York saying that under a court order if you get a court order you are restricting us anyhow, but I don't mind the restriction—but if you get a court order based on reasonableness, you may tap wires against people that you believe, honestly believe, are engaged in crime.

That is all we are asking for.

I say that if we were fellows who asked this and didn't have a record of decency behind us, not only with regard to 20 years of operation but with regard to other things that we do, our attitudes toward defendants, rights of people, one might say "am I right about these fellows—I don't know if I can trust them with this right, but the record shows, if I say so myself, that we could be trusted with this power which we have never had and never abused."

Senator Carroll. I thank you, Mr. Chairman.

Senator Hennings. Thank you for your contribution, Senator Carroll.

I would like to announce now that at future hearings on this subject matter which we expect to have and, indeed, I am sure we are going to have, the subcommittee will hear two witnesses who were invited to the hearings today but could not appear—Mr. Joseph Welch whom most of you know or know of, a very prominent lawyer in the city of Boston; and Mr. Whitney North Seymour, who will be president of the American Bar Association next year, an active member of the bar of the city of New York. I have had many pleasant and profitable discussions with Mr. Seymour on a variety of questions going clear back to the time of the Bricker amendment.

We all know something not only of Mr. Welch's high order of ability but also his philosophy.

Mr. Silver, on behalf of the Senate and this committee, I want to thank you.

I know how busy you are—I don't really know how busy you are, but as I said to Lauris Norstad, the head of

SHAEF, in Paris a year so ago, nobody knows the responsibility you have except you.

I say to you that nobody knows how busy you are except you.

We appreciate very much your having taken your time, as we appreciate Mr. Dash's taking his time, to come down and shed more light upon the subject which has raised many, many questions in the minds of, as Senator Carroll says, not just the breast beaters and the professional liberals, but some people who are concerned, very deeply concerned with basic constitutional rights; also, indeed, deeply concerned with the protection of the people who cannot protect themselves against people who do not behave themselves—the predators, the mobs, the gangs. We all know something about that. We have had to deal with them.

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STATE OF NEW YORK

COMMISSION OF INVESTIGATION

TRANSCRIPT OF PUBLIC HEARINGS

concerning

THE CURRENT WIRETAPPING DILEMMA IN NEW YORK STATE CREATED BY RECENT FEDERAL COURT DECISIONS

270 Broadway
New York, N. Y.

April 5, 1960
10:00 A.M.

Before:

GOODMAN A. SARACHAN,
Chairman,

JACOB GRUMET,
MYLES J. LANE,
JOHN W. RYAN, JR.,
Commissioners,

NATHAN SKOLNIK,
Deputy Commissioner,

ELIOT H. LUMBARD,
Chief Counsel.

Testimony of Hon. Frank S. Hogan Before the New York State Commission of Investigation

TRANSCRIPT OF PROCEEDINGS

The Chairman: This public hearing will come to order. The reporter will now be sworn.

(Herman Rosenfield, the reporter, was thereupon duly sworn.)

The Chairman: Section 2, Subdivision 10 of the Act creating this Commission reads as follows:

> "By such means and to such extent as it shall deem appropriate, the Commission shall keep the public informed as to the operations of organized crime and problems of criminal law enforcement in the State."

The four members of this Commission have unanimously agreed that a serious problem of criminal law enforcement has been recently created by certain Federal Court decisions. These are concerned with the use in State criminal trials of evidence procured by wiretapping. Under the Section that I have read, therefore, this Commission deems it of paramount importance to inform the public of the seriousness of this problem.

There are two aspects which we believe the evidence presented at this hearing will disclose:

First: That wiretapping, as permitted by the Constitution and laws of this State, does not in the slightest degree threaten the privacy of telephone conversations between ordinary law-abiding citizens;

And second: That forbidding the use of wiretap evidence in a State criminal trial will seriously hamper the attempts of law enforcement officials to stamp out organized crime and racketeering.

Recently, as most of you undoubtedly know, a Federal Court enjoined the use of wiretap evidence in a serious criminal trial and, therefore, delayed the ordinary course of bringing this case to trial. Other decisions along the same line have sharpened the present crisis. Some New York Judges have refused to grant wiretap orders which are perfectly legal under State law upon the ground that to do otherwise would give judicial sanction to an act illegal under Federal law.

As a result, numerous applications have been made on behalf of defendants to stop or reverse their prosecutions, and district attorneys, too, have, I know, with reason, hesitated to proceed with certain cases. Investigations of great public importance—especially those dealing with organized crime in the fields of narcotics and official corruption—have been halted or severely restricted.

Those of us who are endeavoring to deal particularly with organized crime and public corruption feel that the administration of criminal justice in this State is gravely affected. We feel it of the utmost importance to enlighten the people throughout the State as to this situation so that public opinion, at least in New York State, will bring pressure to bear on Congress to make the necessary amendment to the Federal Communications Act.

Briefly, the legal character of the problem is as follows:

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Intercepting telephone messages—popularly called wiretapping—is illegal and a felony under the law of this State when it is unauthorized. The exception in the law is carefully restricted so as to safeguard private individuals and protect their civil liberties. And I know that I speak for my three fellow Commissioners when I say that all of us are as anxious to safeguard private individuals and protect their civil liberties as anybody else.

A legal wiretap may be made only when authorized by a Court upon formal application. This application may be made only by a relatively few public officials, who must submit a sworn statement that there exists "reasonable ground to believe that evidence of crime may be thus obtained".* When a Court does authorize a wiretap, it can be effective for not more than two months. Also, the divulgence of information obtained by wiretap is very much restricted.

The procedure which I have thus outlined is expressly authorized by Article I, Section 12, of the New York State Constitution, by Article 73 of the Penal Law of this State, and Sections 813-a and b of the Code of Criminal Procedure.

The right of New York State under its fundamental police powers to make such provisions in its Constitution and law would seem to be clear. However, some Courts have now interpreted a Federal statute—Sections 605 and 502 of the Federal Communications Act**—to prohibit and actually make criminal these State procedures if information obtained by wiretaps is revealed or used in any way.

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* Section 813-a, New York Code of Criminal Procedure.

** Title 47, United States Code.

On the other hand, New York Courts have unanimously held that Section 605 of the Federal Communications Act does not require the exclusion of wiretap evidence in New York Courts when properly introduced.

It is obvious that the action of Federal Courts barring evidence in a New York State criminal case obtained by Court Order and admissible in New York Courts has raised a serious dilemma.

During these hearings today and tomorrow, the Commission intends to explore fully the practical results of the present confused situation. We believe the hearings will provide important information for the public on this vital issue. Ultimately, as above indicated, the remedy lies in an amendment of the Federal Communications Act by the United States Congress.

And so, because of what I have been saying, we have invited many prominent law enforcement officers and other distinguished gentlemen who are interested in the present problem concerning wiretaps, who will testify at this hearing. Since this is a hearing for public information and not the result of a criminal or public corruption investigation, we are not going to ask these distinguished gentlemen to be sworn.

The first witness is Mr. Frank S. Hogan, the distinguished District Attorney of New York County.

Mr. Hogan: Mr. Chairman, Commissioners,—

The Chairman: May I ask you a few questions preliminarily.

Mr. Hogan: May I first thank the Commission for providing this forum to me and my office. I know I express

the thought of all law enforcement officials in our State in expressing appreciation to the Commissioners for giving us this opportunity to give voice to the dilemma which we face as a result of these Federal decisions.

The Chairman: Mr. Hogan, how long have you been District Attorney of New York County?

Mr. Hogan: Since January 1, 1942.

The Chairman: During these 18 years or so as District Attorney, you undoubtedly have had a great deal of experience with wiretaps, is that correct?

Mr. Hogan: That's true.

The Chairman: During these many years, you undoubtedly have come to some conclusions as to the need of Court-authorized wiretaps in the field of law enforcement, is that correct, sir?

Mr. Hogan: True.

The Chairman: We understand, Mr. Hogan, that a serious problem has developed in the field of law enforcement as a result of recent Court decisions relating to an interpretation of Section 605 of the Federal Communications Act, and regarding the use in State criminal trials of evidence procured by wiretapping pursuant to Court Order. I assume from what you say that you agree with that statement?

Mr. Hogan: I do, indeed.

The Chairman: Mr. Hogan, will you please tell us in your own way about these problems and then perhaps after you have finished telling us we may have a few questions we would like to ask you.

Mr. Hogan: Fine.

Mr. Chairman—

The Chairman: We have a request to set up some equipment here, and so we will take a short recess for a few minutes, if you don't mind, Mr. Hogan.

Commissioner Lane: We are televising this, in view of the fact that it is something of public interest.

Commissioner Grumet: Ordinarily we do not permit television cameras to be set up for our hearings, but in view of the fact that this is for public information and public education, we may consider that in this particular case, is that correct?

The Chairman: That's correct, yes. We feel very strongly that in most of our public hearings, certainly private hearings, we do not have television cameras, but since our principal purpose in this entire hearing is to inform the public and as widespread a public as possible, we will ask your indulgence for a few minutes.

Commissioner Lane: Do you have any objection, Mr. Hogan?

Mr. Hogan: None.

(A recess was taken.)

The Chairman: We would like to have the hearing room very quiet, please, while Mr. Hogan proceeds.

Mr. Hogan: Mr. Chairman and Commissioners: What I have to say this morning, for purposes of outline, can be roughly divided into three sections. As your first witness, it may be appropriate for me, initially, to deal with some of the wild charges that have been made with respect to wiretapping, legal and illegal, in order that we may

put the use of this investigative technique by New York State law enforcement officials in what I think is proper perspective.

In the second part of my statement, I shall consider with you the experience of my office with wiretapping, and I shall try to show why we have concluded that it is an irreplaceable weapon, in the fight against organized crime.

Your Chairman, in his letter of invitation, has suggested that specific examples of usefulness of this technique might be of interest. I shall make reference to a number of cases and investigations where the privilege accorded to us to intercept telephonic conversations has been of inestimable aid.

Finally, I should like to discuss the legal status of wiretapping today—the great confusion that exists as the result of recent Federal Court holdings, and the dilemma these decisions and opinions pose to conscientious, local law enforcement officials.

Initially, therefore, in attempting to evaluate legalized wiretapping by comparing its unquestionable benefits with its possible abuses, we must keep a sharp eye out for the hysterical alarmist with a flair for the dramatic. It has been our experience that this field produces the most extravagant accusations of abusive practices, as ill-founded and unsupported as they are shocking, and as irresponsible as they are inaccurate.

You will recall that some years ago Mr. Justice Douglas of the United States Supreme Court, in a book called "An Almanac of Liberty" stated that, in the year 1952 alone, there were in New York City at least 58,000 Court orders

permitting wiretapping. When called before a Congressional committee considering wiretapping in 1955, the "legman" or reporter or researcher employed by Justice Douglas beat an unashamed retreat. He first stated that this figure of 58,000 included illegal wiretaps as well as those pursuant to Court Orders and then, by way of amplification, indicated that he was unable to recollect the name of a single one of the informants who allegedly supplied the factual quicksand upon which his calculations were unfounded.

Now, when you get a United States Supreme Court Justice making such an unsupported and such a ridiculous statement—and mind you, he hasn't retracted it to this day—and his figures are off by at least 10,000 percent, it is well to examine carefully the promiscuous, hearsay contentions of lesser personages who find that this kind of mathematical shocker readily attracts the ear of the community.

Last year, Samuel Dash, in a book called "The Eavesdroppers" indicated that in New York City illegal police wiretaps might run as high as 30,000 a year. Mr. Dash, more careful than Justice Douglas, pointed out that this astronomical figure did not represent legal wiretaps. But here again, you read his book and you find that it is based on mathematical speculations supported only by the allegations of anonymous persons.

Now, I don't know what conclusions Mr. Dash reached—how he feels today about legalized wiretapping—but I do know that, when he was District Attorney of the City of Philadelphia, he strongly supported it. I quote just the

first paragraph of a letter he sent to me on May 12, 1955. It is on a letterhead, reading, "Samuel Dash, Acting District Attorney, Philadelphia, Pennsylvania":

> "Dear Mr. Hogan: At present we are in a drag-out, knock-down fight in Pennsylvania on wiretapping. Our office fully agrees with your position on this question and believes that it is vital to effective law enforcement that Court-supervised wiretapping by the District Attorney should be permitted."

Actually the Douglas and Dash figures are absurd. A statewide survey by our New York State District Attorneys Association, conducted some years ago, revealed about 500 legal wiretaps annually in the entire state. With respect to the alleged illegal wiretaps by law enforcement personnel, I can only say that in my 18 years of experience as District Attorney I have never received any evidence or even a complaint that a police officer has used this information for corrupt, extorsive or coercive reasons, and there wouldn't be any other reason for using it illegally.

I am aware that there was a presentment in Kings County which made reference to several examples where this had been done and I am not here to suggest that it hasn't happened, but all I can say is that in the light of my long 18 years of my long experience, it seems to me that, if it were as prevalent as Mr. Dash suggests, we would have had many complaints about police engaged in this illegal activity. We have had complaints about them in every other area of penal law, unfortunately, although in minor degree and percentage and they have been accused of many other things, but not illegal wiretapping.

And since we have handled, in the time I have been District Attorney, some half-million matters it would not seem that illegal wiretapping could possibly be as prevalent as Mr. Dash's figures would suggest.

For a more accurate picture of abusive wiretapping, so-called, by law enforcement agents, one should read, I think, the 1956 report of the Committee on Civil Rights of the New York State Bar Association, headed by Whitney North Seymour, which stated, and I quote:

> "We want to make clear that we do not assert that there has been any widespread illegal wiretapping activity or even excessive resort to lawful use of wiretapping by public officials. We are fully aware of the problems which they have. Such officials in this State are fine public servants, zealous in the discharge of their duty and conscious of legal restrictions."

Along similar lines, the 1957 report of the New York State Joint Legislative Committee on Illegal Interception of Communications said:

"We know of no instance in which illegal wiretap evidence has been offered by any prosecutor since law enforcement wiretapping was regularized in 1938", and further the Committee said, "It may be emphasized that these bills introduced by the Committee have been related primarily to violations of privacy by private investigators; not to any charges of abuse or misconduct by officers of the law."

On the subject of the number of legal wiretaps in New York City, I should like to make some comments: In so

far as my office is concerned, I have had prepared two statistical charts. These show the extent of our overall prosecuting activity, the number and kinds of investigations in which wiretaps were installed, and the results obtained. The figures, I think, demonstrate that, although wiretaps were installed in a very small percentage of our cases, they have produced remarkable results in the toughest type of investigation, those involving organized crime and corruption.

This first chart will indicate the experience of our office in the last ten years. To the left on the chart you will see that we have tried to indicate the criminal business of the office. Taking last year, for example, we had 4,116 dispositions in the Court of General Sessions; 28,045 dispositions in the Court of Special Sessions; 2,290 gambling cases and dispositions in the Magistrate's Court. The other cases, for the most part, in the Magistrate's Courts do not originate in our office, nor do we conduct any investigations, so they have been excluded.

In addition, we have had some 11,017 complaints, making a total of 45,468 criminal matters that were disposed of in New York County alone.

Now, only in 17 investigations did we go to the Judges of the Court of General Sessions and ask for permission to intercept telephone conversations, and we obtained some 75 Orders in those 17 investigations. The letter there indicates that, in addition to the number 75, there were Court Orders in three additional instances where the taps were not installed. Evidently an arrest intervened, or for some reason or other we didn't exercise the authority, but even

adding three, that would mean that only 78 orders were signed in the year 1959. Some demon calculator has figured —if you look at the next column—that that means that the number of wiretap orders per 1,000 dispositions in New York County in the year 1959 was 1.6 less than two wiretap orders for every thousand criminal dispositions.

Now, what were the results? Well, there were in 1959, 41 arrests and, up to today, there have been 13 convictions and 25 cases are pending. Now you will see that 1959 is pretty much an average year. For the 10-year period there were 343,745 dispositions. Interceptions were permitted in 219 investigations; 727 orders were signed by Judges of the Court of General Sessions. The average over the 10-year period is 2.1 wiretap orders per 1,000 dispositions; 458 arrests resulted; 335 convictions; 70 acquittals or dismissals; 17 otherwise disposed of, abated by reason of death or for some other reason, and 36 cases pending.

Well, I don't want to belabor the point, but I think the chart clearly shows, and these figures show, that legalized wiretapping is not, as has been charged sometimes, irresponsibly and excessively utilized in criminal investigations. In other words, Commissioners, we do not abuse the privilege. We are very careful to exercise the privilege only in those cases where other means of investigation are unavailing.

We have seen—and I want to make this further point, particularly since the Chairman in his opening remarks emphasized the concern that all of us feel, all law enforcement officials feel about the privacy that every citizen is

entitled to in matters of telephone conversations—but we have seen that, in this period of ten years, we obtained orders from General Sessions judges 727 times. If you divided that by 10 you get a little less than 73 orders in the course of a year. That would be the average number over this 10-year period.

Now, our City police, I am advised, utilized an additional 70 in Manhattan in 1958 and 90 in 1959. Incidentally, in the entire city the police got only 124 orders in 1958 and only 225 in 1959.

But, confining ourselves to Manhattan, we see, if we take our office average of 73 and the average for these two years of the Police Department of 80, we have in all 153 orders, including renewals, in New York County for an average year.

A wiretap order lasts only 60 days, so it is obvious that, on an average, at any one time the number of legal interceptions in existence in New York County is less than 30. If you compare this figure to the number of telephones in New York county—at present estimated by the Telephone Company to be just under 1,800,000—you get some indication of the danger of a law enforcement official listening in on a conversation that doesn't concern some criminal enterprise.

I think these figures afford a mathematic basis for evaluating the so-called "danger" of wiretapping. It comes out to about one wiretap to every 60,000 telephones. This is less than 1/600 of 1%. Any scientist, figuring zones of tolerance for rocket engines, might well be proud of such precision.

And, even in this small percentage you are dealing for the most part, you are asking the privilege to intercept telephone conversations of subscribers who have criminal records and who, it has been clearly demonstrated to the satisfaction of a judge, are engaged in some criminal business. So that there is only a microscopic likelihood that there will be a legal tap on an innocent person's telephone. When that is weighed against the value to the community of wiretapping, in terms of cases that could not be made if it were not for this privilege, the argument for wiretapping is, it seems to me, based on my 25 years experience in the District Attorney's office, conclusive.

The second chart, and I am sorry that I haven't it in the same form as this one, but I do have copies of it—

The Chairman: Mr. Hogan, you would have no objection if we made these charts part of the record?

Mr. Hogan: Certainly not.

The Chairman: Have the first chart which you have been describing designated Exhibit 1 in the record.

(Chart entitled, "Overall Prosecuting Activity, etc., in New York County" was marked Commission's Exhibit No. 1.)

Overall Prosecuting Activity and the Use of Court-Ordered, Legal Wiretapping Office of the District Attorney, New York County, for Ten Year Period 1950-59

Year	Criminal Matters Disposed of— General Sessions	Special Sessions	Magistrates Court (Gambling)	Complaints	Total	Number of Investigations Where Wiretaps Installed	Number of Wiretap Orders Including Renewals	Number of Wiretap Orders per 1,000 Dispositions	Number of Arrests Resulting	Convictions	Acquittals and Discharges	Otherwise Disposed of	Cases Pending
1950	2,685	12,693	2,986	11,147	29,511	25	74	2.5	51	41	8	2(C,D)	0
1951	3,151	13,292	2,298	11,611	30,352	20	81	2.7	57	55	2	0	0
1952	3,428	11,063	1,606	11,796	27,893	28	102	3.6	41	28	8	5(C)	0
1953	3,632	12,292	1,967	11,623	29,514	25	100	3.4	36	17	18	1(C)	0
1954	3,983	13,881	1,658	10,259	29,781	33	97	3.2	92	62	26(B)	4(A)	0
1955	3,640	17,836	2,507	10,308	34,921	17	41	1.2	70	61	7	2(C)	0
1956	3,237	18,510	2,526	10,615	34,888	28	53(E)	1.5	34	33	0	0	1
1957	3,462	21,604	2,289	10,411	37,766	11	55(F)	1.5	18	13	1	0	4
1958	4,026	24,658	2,306	12,661	43,651	15	49(G)	1.5	18	12	0	0	6
1959	4,116	28,045	2,290	11,017	45,468	17	75(H)	1.6	41	13	0	3(C)	25
Total	35,360	173,874	22,433	111,448	343,745	219	727	2.1	458	335	70	17	36

Note:—As of July 1st 1957—Renewals required every two months instead of six months

(A) D.O.R.

(B) Cases of 15 attorneys are pending before Coordinating Committee on Discipline of the Bar, 5 of whom were convicted and 10 dismissed in our courts.

(C) Turned over to other authorities.

(D) Abated by death.

(E) In addition to these, court orders in Five additional instances, but taps not installed.

(F) In addition to these, court orders in One additional instance, but taps not installed.

(G) In addition to these, court orders in One additional instance, but taps not installed.

(H) In addition to these, court orders in Three additional instances, but taps not installed.

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Mr. Hogan: The second chart, so-called, indicates the types of investigations where these orders were secured and installed. You will see that it runs pretty much the gamut of crime categories.

The Chairman: The second chart is designated Exhibit 2 in the record.

(Document entitled "Typical Investigations, etc., in New York County" was marked Commission's Exhibit No. 2.)

NEW YORK COUNTY

Types of Investigations Where Wiretap Orders Were Secured and Installed 1955–59

Categories of Crime	Number of investigations in which wires were installed
Extortion, coercion, blackmail	22
Bribery and official corruption	18
Larcenies and allied frauds	12
Usury and rent gouge	7
Perjury and criminal contempt	6
Organized gambling (lottery, policy, bookmaking)	4
Illegal wiretapping	4
Abortion	3
Robbery, assault, and possession of weapons	3
Criminal receiving, burglar's tools	2
Narcotics	2
Misrepresentation to obtain information from phone co. (PL 743 sub. 2)	1
Others (jury tampering, forgery, etc.)	4
Total	88

Mr. Hogan: About 50% of them were concerned with extortion, coercion, blackmail, bribery, official corruption, larcenies and allied frauds—these are the cases where it is extremely difficult to get evidence and its use is certainly justified in such cases. But there is a great range of criminal activity that we seek to investigate and that is indicated, I think, in this chart.

Perhaps it would be helpful if I referred to certain investigations which have been conducted by my office and which have been successfully concluded through leads and information furnished by wiretaps.

Commissioner Grumet: Mr. Hogan, before you do that I think it may be a good thing if we cited the specific figure. You said 50%. I noticed that on a total of 88 investigations in which wiretaps were installed, 52 were in the categories that you mentioned, such as extortion, coercion, blackmail, bribery and official corruption, larcenies and allied frauds, which are the more important cases.

Mr. Hogan: I think Commissioner Grumet, that those categories would largely describe the work of the Rackets Bureau and the Frauds Bureau of our office and those bureaus are engaged in the long, complex investigations that take enormous manpower and that ar ost difficult of solution. So it is in the field of organized crime where this technique, investigative technique, is most useful.

Occasionally, as you can see here, we have used it in combatting other crimes such as illegal wiretapping and gambling, of course, where it is organized narcotics and other things.

Commissioner Grumet: But there also seems to be a common notion that it is used frequently in cases of prosti-

tution, and I noticed that it hasn't been used by you in any cases involving prostitution. The public seems to resent that in the field of prostitution. I notice there has been no wiretapping here, according to your figures, in prostitution.

Mr. Hogan: We would never use it unless prostitution were organized as it was in Luciano's day or as gambling was and is organized by mobs and syndicates at the present time, and as we recall it in the days of Frank Erickson and other top gamblers and mobsters.

Several years ago we had a so-called basketball investigation that unearthed corruption in this college sport on a nation-wide scale. This scandal involved 15 professional fixers, 33 players, 6 colleges, and 49 college games in which score-rigging deals were negotiated in New York and in 22 other cities in 17 states.

In the 14-month investigation, information obtained over the wires enabled us to piece together an accurate picture of the workings of this bribery ring. The recordings of incriminating conversations led some recalcitrant witnesses to break and to cooperate against the fixers and higher-ups. Thirty-eight arrests resulted and of these 36 were convicted, including 14 of the 15 fixers. The 15th died before his trial was completed.

Now, this was a case that just couldn't have been started without this privilege. All we had after months of investigation could be labeled rumors. But a newspaper man, Max Kase of the Journal American, came in one day and said "Are you interested in this sort of thing?" and we said "Yes".

He said, "Well, watch Eddie Gard of Long Island University". That was a tip that proved invaluable. Detectives

were assigned to Gard and they found that he was meeting a character named Solazzo. This Solazzo, who had a long criminal record, was ultimately convicted in addition to all his other convictions, of smuggling gold into this country.

Well, Solazzo was meeting underworld characters. He was also meeting basketball players from schools other than Long Island University. So with this information, obtained by means of surveillance, we were able to prepare an affidavit which persuaded a judge of the Court of General Sessions that we should have the privilege of intercepting the conversations of Solazzo, this criminal.

We were able, as a result of intercepted conversations, to cover Solazzo's meetings. Of course, this gave us vital information. We could cover the meetings with basketball players and we had the conversations with the players, so that, when ultimately we called them in to the office and they lied their heads off—said they weren't involved—it was a simple expedient to play these intercepted telephone conversations. And, in the course of one night, a half dozen of them broke and gave us the names of the fixers.

But I don't think we could have made a dent in this criminal enterprise, which was affecting college sport all over the country, without this privilege accorded to us by our statute and by our Constitution.

Wiretaps were used to advantage in successfully prosecuting a half million dollar stolen bond ring, led by one Irving Mishel, who acted as a broker for burglars specializing in stolen securities.

His system of marketing or disposing of these securities was most devious and complex. He operated with forgers and other characters of underworld repute, including one

Irving Nitzberg, an alumnus of "Murder, Inc." A wiretap on Mishel's phone was the prime factor that resulted in his indictment, conviction and a 10 to 20 years prison sentence.

In addition, Nitzberg and eight others were arrested and indicted. All pleaded guilty to charges of grand larceny and forgery.

Wiretaps also enabled us to break up an intricate conspiracy involving a ring of crooked policy operators who succeeded in fixing the figures upon which their game was based, so as to reduce their payoffs on winning numbers to a minimum.

This scheme depended to a large extent upon manipulation of daily clearance figures of the Cincinnati Clearing House and upon a network of daily telephone calls between Ohio, New Jersey and New York. The use of the telephone to further the criminal conspiracy proved to be the gangsters undoing—and they were gangsters. They weren't just gamblers, as this Commission has properly pointed out.

Gambling of this size is a mob enterprise and the interception of telephone calls was the only way we could reach this three-state mob. Eight of them were convicted upon charges of conspiracy and contriving a lottery, including, if you please, the secretary of the Cincinnati Clearing House, one of the most reputable citizens of Cincinnati, who was being paid a thousand dollars a week for supplying a number, the third digit of the payoff, each day. He would select the number that had the least play on that particular day.

Recorded wiretap conversations were most helpful in bringing about the conviction of the New Jersey insurance

broker, Louis Saperstein, and the indictment of his underworld associates, Scalise and Cilento.

These underworld associates, operating between New York and New Jersey, were able to siphon off from a labor union welfare fund the sum of $300,000 in less than three years.

Wiretap evidence is probably the most important element in any attempt to deal with fake charity racketeers who operate multi-phone boiler room, so-called, from which solicitations of funds bring in fantastic amounts from a gullible public. I don't think you could even make an attempt in that area without this privilege.

Our wiretaps led directly to the capture of a participant in a $107,000 payroll stickup, Sam Granito, who was wanted by the Boston police.

Wiretapping is a powerful investigating weapon in the field of labor racketeering where the criminals' cunning and the victims', the businessmen's fear, would otherwise combin to conceal crime and make a mockery of law enforcement.

Our files are full of cases where, but for wiretaps, some of the worst racketeering offenders might well have gone unpunished.

Without wiretaps, for example, we never could have convicted the powerful waterfront labor boss, Mike Clemente, and his two lieutenants, Saro Moganero and Louis Gaccione.

John DioGuardi, labor racketeer and former associate of Lepke and Gurrah, returned to his haunts in the garment area after serving a term for extortion. Surveillance, including wiretapping, was undertaken since he seemed to be blossoming out as a power in a number of labor unions.

This surveillance was productive. Two of Dio's lieutenants in one of the unions, Anthony Topazio and an ex-burglar, Joseph Cohen, were convicted for trying to shake down a flower bulb concern. They were sentenced to the penitentiary.

Another associate of DioGuardi, Samuel Zachman, tried the same extortion racket in the messenger service industry. He and his partner, Nicholas Leone, were convicted and sentenced to State Prison as a result of wiretapping.

This DioGuardi—we have kept track of him for years through surveillance and wiretapping, and we have found him in all sorts of criminal enterprises and many, many indictments have resulted.

I won't burden the record with others—Samuel Goldstein, Max Chester—there are many others who were convicted on evidence obtained by wiretapping.

In the field of labor extortions, we have, in 1954 alone, six arrests of faithless labor leaders who were convicted of extortion; Aaron Kleinman, Secretary-Treasurer of Local 875—these are unions in the International Brotherhood of Teamsters—Nat Carmel, Vice President, Local 875; Jack Berger, President, Local 875; Sam Zakor, Business Agent, Local 875 and 275; Milton Levine, President Local 275, Business Agent, Local 875; and Jack Priori, Business Agent, Local 875 and 275. All plead guilty to charges of extortion, conspiracy—

Commissioner Grumet: Too bad Mr. Justice Douglas isn't here to listen to it.

Mr. Hogan: Continuing with DioGuardi, and more recently, we were concerned with his activities and those of

James Plumeri, whom you may recall, Commissioner Grumet—

Commissioner Grumet: Very well.

Mr. Hogan: —alias Jimmy Doyle. I must point out that Commissioner Grumet indicted and convicted Plumeri, so there can be no misinterpretation of my reference. And Anthony "Ducks" Corrallo.

It was found that these racketeers were associating with Frank Carbo, a boxing racketeer and gunman. Court-approved telephone wiretap plants were installed, some of which were monitored around the clock, to keep track of the doings of these characters.

Many important underworld meetings were arranged on the telephone so that our detectives were enabled to cover the meetings and identify the participants at those meetings in cities as far away as California.

The following arrests were made: Carbo was charged with being an undercover fight manager and with the crime of conspiracy; Gabe Genovese, undercover fight manager; Harry Siegel, undercover fight manager; Samuel Grossner, unlicensed fight manager; Bert Grant, charged with bribery of a participant in a professional sport.

Carbo has pleaded guilty, Genovese has been found guilty. The other cases are pending. In addition, James D. Norris resigned as President of the International Boxing Club as a result of this activity and there are a half dozen matchmakers and promoters who lost their licenses when the interceptions were turned over to the New York State Boxing Commission.

I have tried to indicate, by this sampling, how very valuable this privilege is. I have tried to indicate how spar-

ingly we use it. Now I would like to conclude by making some reference to the legal status of wiretapping.

For more than thirty years, it has been the law in this country that wiretapping by law enforcement officials, with or without a court order, is not a violation of our Constitution. It may be prohibited by Section 605 of the Federal Communications Act, but no court has said that it violates any section of the Bill of Rights. The law was established so long ago as 1928 in the Olmstead case.*

Most people can only recall two words from that decision —the phrase, "dirty business", as used by Justice Holmes in his dissent. But what they overlook is that Justice Holmes expressly disavowed the position that wiretapping was violative of our Federal Bill of Rights. And, when he used the "dirty business" phrase, he was not describing legal wiretapping so much as he was characterizing the activities of Federal officials who, in gathering evidence, committed a crime.

These Federal officers committed illegal wiretapping. They tapped wires illegally, without court order, in defiance of the penal sanctions of the State of Washington.

In 1957, two and a half years ago, the United States Supreme Court, in Benanti against the United States,** held that the express language of Congress, used in Section 605 of the Federal Communications Act of 1934, barred wiretapping or, at least, interception and divulgence of telephonic communications—even when done by state officials pursuant to authority granted by state law.

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* *Olmstead* v. *United States*, 277 U. S. 438 (1928).

** 355 U. S. 96 (1957).

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The language of Section 605 was thus interpreted for the first time, some 23 years after the passage of the Federal Communications Act, without regard, I submit, to that Act's legislative history.

The pre-passage history of the 1934 Act fails to reveal that its purpose was to bar wiretapping by authorized state officials. There had been prior efforts at enacting a Congressional ban on all wiretapping but these efforts had failed. Section 605 of the Federal Communications Act was not, at the time, regarded as another such effort. Rather, it merely repeated a portion of the earlier 1927 Radio Act, with the design of conferring upon the Federal Communications Commission jurisdiction over radio and wire communications.

An admirable statement was made by Assemblyman Savarese, Chairman of the New York State Joint Legislative Committee on Privacy of Communications, only recently, March 14, 1960. I would like to quote a few paragraphs from it with reference to the intent of Congress in passing the 1934 Communications Act.

Mr. Savarese, speaking for the Committee, says, "The crux of the matter lies not in any court decision but in the intent of Congress, which has never adequately expressed itself on wiretapping.

"The Supreme Court has erected a vast super-structure of opinion law on a 'sleeper' of 31 obscure words in the Federal Communications Act of 1934, which were obviously never intended as definite legislation on wiretapping.

"What this adds up to is that for a quarter of a century the Congress has abdicated its duty and made the Supreme Court take over its legislative power in this area. Congress

never debated or even mentioned wiretapping when it passed the Act of 1934—20,000 words regulating the telegraph, telephone and radio industries. Yet a brief, obscure and unidentified clause in the act—truly a needle in a legislative haystack—has become the sole basis for a vast amount of law, as declared in Supreme Court opinions.

"The clause, merely forbidding the interception and divulgence of messages, is a cryptic, delphic utterance; and the Supreme Court has labored industriously to define its meaning.

"Doubtless, the learned justices felt they were on the side of the angels when they declared on this basis years ago that law enforcement wiretapping was unethical and immoral. But how many angels does the Congress expect to stand on the point of a needle?

"If", Assemblyman Savarese continues, "Congress really intended to deal with the complex subject of wiretapping in the 1934 Act, it did so in an inadequate, slipshod, half-baked way.

"I do not believe for a minute that Congress intends now to supersede the police power of our fifty states. This would break down our entire structure of criminal law. But Congress should clarify its intent, in its own words, instead of putting this legislative burden on the Supreme Court."

That ends what I think is a very fine statement with respect to the history of this 1934 Communications Act.

Now, I have further evidence that Congress, in 1934, did not intend to ban wiretapping, pursuant to court order. It seems clear to me that the use by various congressional committees of taps, which have been legally made by state

officials, and thereafter supplied by district attorneys offices to the Congressmen and Senators, is an acknowledment by them that they had no such intention.

I recall that, when I appeared before the House Judiciary Committee in 1955, Congressman Celler, the Chairman of that Committee, said, and I quote from the transcript. It says: "Congressman Celler: I think the general idea of this committee is that we would not interfere with the practices, the legal practices, that obtained in the various states. So you can set your mind at rest as far as New York is concerned. That is New York's problem and I don't think we would attempt to make the Federal statute paramount. I don't know that we could. If there are any restrictions inconsistent with the New York statute. I am sure the New York statute will prevail insofar as New York is concerned".

Over the years my office—and I am sure other offices, Mr. Silver's and many other offices—we have provided transcripts of telephone conversations to Senate committees, to House committees, to the New York State Athletic Commission, to the New York State Crime Commission—I think even this Commission has availed itself of them, occasionally. And, may I say, the Commission of Investigation has reciprocated; our working arrangements have been most cordial and rewarding. I have dozens of letters from Senators and Congressmen, thanking me for the use of these transcripts. I just can't believe that Congressmen and Senators would so stultify themselves as to pass a law forbidding wiretaps and then use the intercepted telephone conversations in regularized Senate and House

hearings. But they do accept these interceptions, they do utilize them, they do ratify them by their use of them in these committees.

Here I have a letter from Estes Kefauver dated July 5, 1951. He says:

"I have just read with great interest Lester Velie's article in the July 7th issue of Colliers, entitled 'Crime Busting is Right Up Hogan's Alley', and I was attracted by the sentence which reads, 'It was Hogan's material that stole the show and helped make the Senate crime investigation a smashing success!'".

Continues Senator Kefauver: "I would like to second Mr. Velie's comments in this regard and say that I am personally very grateful to you for the fine cooperation and assistance you gave to our Committee."

That material was 90 per cent material that we obtained by intercepting telephone conversations. Much of it had to do with Frank Costello. Back in 1943, we were given the opportunity to intercept Costello's telephone conversations. I think we were on that wire for three or four months. Those intercepted conversations have been used, in the intervening 17 years, by 20 or 30 federal and state agencies. They have been invaluable in establishing the cast of criminal characters in the whole eastern part of the United States.

Costello would call Longy Zwillman in Jersey, the Moretti brothers. We obtained the details of his gambling ventures in Florida and Los Angles. It was all set out there so that Kefauver and the State Crime Commission

and the Federal agencies could look it over as they might look over a blueprint.

I have here a half dozen letters from Senator McClellan, thanking our office for the cooperation we gave the Senate Select Committee on Improper Activities in the Labor or Management Field and a dozen more from his counsel, Robert Kennedy. We have other acknowledgments from many House and Senate committees, thanking us for information that we obtained by reason of this invaluable investigative device.

The Chairman: Mr. Hogan, pardon me for interrupting a very enlightening statement. Would you mind if we make copies of those letters to which you have referred just now and make them a part of our records?

Mr. Hogan: Certainly not. They do get voluminous, though, and contain some references to particular matters that should not presently be made a matter of general public record. I'll send over photostats of several as samples, if that will be satisfactory. However, of course all will be available for the Commission's inspection.

The Chairman: We will consider those photostatic copies together as Commission Exhibit 3.

Mr. Hogan: However, no matter what we may think about the intent of Congress in 1934, we are faced with this Benanti opinion. That has been the law since December of 1957 in this country. Therefore, the district attorneys of the State of New York and the National Association of District Attorneys, represented here this morning by Edward Silver, District Attorney of Kings County, who is the President of our National Association—both associ-

ations have urged that Section 605 of the Federal Communications Act be amended in order to legalize the full use of wiretapping by state law enforcement officials, when acting pursuant to court order.

Although we still lack such Federal legislation, it has been our understanding that we are free to intercept communications, under such conditions as are permitted by state law, for investigative purposes. Section 605 makes it a Federal crime to intercept, but it adds the words "and divulge such intercepted communications".

It has long been the position of the United States Attorney General and the Federal Bureau of Investigation that no Federal crime exists unless both elements are present, that is, interception and divulgence.

No Federal case, prior to this year, has held that when a wiretap is used in our state courts, having been obtained under proper state procedure, that such use constitutes criminal divulgence.

However, on February 11th of this year in the case of Pugach against Dollinger*, the United States Court of Appeals for this Circuit issued a temporary restraining order, barring the district attorney in Bronx County from divulging wiretap information in the trial of a criminal action pending in that county.

The case, you will recall, was one involving the partial blinding by acid of a young girl, allegedly committed by a rejected suitor, the defendant. This matter is presently

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* 275 F. 2d 503 (2d Cir. 1960), (temporary injunction granted); 277 F. 2d (2nd Cir. 1960) (permanent injunction denied), *cert. granted*, 363 U. S. 836 (1960).

under consideration by the Circuit Court, so I don't want to discuss the case.

But I can say—and I have a memorandum here from my chief assistant—how this affects my particular office.

"If this Federal ruling is upheld, it will prevent the prosecution of the following indictments", and ten indictments are listed, largely in the field of organized crime and official corruption. My chief assistant adds: "At least six major investigations, currently being conducted by the Rackets Bureau, will become unproductive if this ruling is sustained. It will have the practical effect of putting an end to these investigations".

Now, in reliance on this Pugach opinion, a judge of the Court of General Sessions on March 7th of this year came down with an opinion in support of his position refusing to sign any further orders authorizing wiretaps.

This was done in the face of the express provision in our State Constitution and the section of our Criminal Code authorizing wiretapping as a proper tool of law enforcement in New York State.

Incidentally, it is also interesting to note that the Chief Justice of our State Court of Appeals said the other day that wiretapping under a competent court order, is still lawful in our State courts, unless and until the Federal courts say that we can't do it.

Commissioner Grumet: Where did he make that statement?

Mr. Hogan: The Presiding Judge of the State's highest court said that while being interviewed on WRCA-TV Searchlight, as reported in the New York Times of March

28, 1960. That is reminiscent of what Justice Fuld said in his dissent in the Broady case.* He concluded his dissent in that case by saying. "Nevertheless, until the Supreme Court has spoken more decisively on the subject, I hesitate to say that Congress has, through Section 605, preempted the field so as to supersede and render ineffectual the provisions of the State Constitution and Code of Criminal Procedure which authorize wiretapping".

The result of all this, obviously, has been to place the conscientious prosecutor in a dilemna. On the one hand, he is sworn to do his duty by unearthing evidence of crime and by prosecuting criminals and to use all of the weapons that are in his legal arsenal to do just that. One of the most important of these weapons certainly is legal wiretapping. But if that key weapon is used, the prosecutor may find that by so doing he violates Federal law.

Well, this is completely repugnant to all prosecutors. We are not only obligated to uphold the law but we feel a moral compulsion to uphold respect for the law and, when it comes to abiding by the law, we want to and we should be setting the example. But here we are placed in this awkward position where, on the one hand, we want to do our duty and, on the other hand, we would appear to be violating Federal law.

Moreover, this creates a dilemma for the federal prosecutor. Should he prosecute state judges, district attorneys, police, for carrying out that duty which is enjoined upon them by state law and which assists in that fight in which he too has his place, the fight against crime?

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* *People* v. *Broady*, 5 N. Y. 2d 500 (1959), *appeal dismissed*, 361 U. S. 8 (1960).

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Well, to help to resolve this dilemma, it seems to me, as your Chairman stated earlier, that we must amend Section 605 of the Federal Communications Act.

And, by way of digression, before concluding—I am sorry to have taken so much time—I want to point out what I think is an interesting paradox.

One of the principal scourges that law enforcement is battling in New York State is narcotics. In this battle the importers and the wholesalers often so insulate themselves that, although they make delivery and sale arrangements, they never touch the stuff, they never touch the contraband.

Telephone taps, along with painstaking investigation, may help to make a case. Our State, with more than 40 per cent of the nation's narcotics addicts, can trace a large portion of our crime load to this addiction.

Practically all narcotics addiction in this State is heroin addiction and under both Federal and State law heroin has absolutely no legal use. All heroin is illegal under all circumstances, and absolutely no heroin originates in the United States. Every last ounce of it is imported from abroad.

If our Federal Government had adequate funds and manpower devoted to the successful enforcement of the Federal Narcotics Law and Customs Procedures, and if perfection were possible, it would be impossible to buy as much as a single two-dollar shot of heroin in New York. Our narcotics problem wouldn't exist.

But, of course, in spite of excellent efforts on the part of Federal agents with inadequate budgets and personnel, such perfection is impossible.

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Incidentally, when the State district attorneys urged that Federal funds be expended to create a major narcotic hospital in this state so that addicts could be dealt with here as a social and a health problem, rather than as a criminal problem, we found out and were told that the United States Department of Health, Education and Welfare deemed narcotics addiction a local problem.

All right, so it is a local problem! This poses an interesting paradox. One of the main causes of crime in this State exists because the Federal government has failed in its efforts to stop the importation of heroin—through no fault of the excellent but inadequate staff assigned to the task, I hasten to add. Yet, when we seek Federal assistance in setting up a health program to deal with the scourge, we are told that it is a local problem and that, therefore, appreciable Federal help will not be forthcoming.

Likewise, when the state seeks to utilize reasonable methods to exercise its own police power to deal with narcotics and connected criminal activities, we are not given reasonable leeway in exercising that police power. Rather, a Federal statute is interpreted as precluding the exercise of a most important tool of such police power.

Now, reverting to the dissent by Judge Fuld for just a moment, he says: "Nevertheless, until the Supreme Court has spoken more decisively on the subject"—. Well, I, for one, am pretty pessimistic about what the Court ultimately will say. I think the opinions of the Court indicate its temper. It should surprise nobody if the Court hold as conclusively as it did in the Nelson case* that the Congress of

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* *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956).

the United States has preempted this area and we are forbidden to engage further in the interception of telephonic communications, in spite of our own Constitution and laws.

So it seems to me that the solution is to maximize and channelize our efforts in order that we may get relief in Congress and the simplest form of relief is an amendment of Section 605.

You get into all sorts of difficulties if you try to arrange a legislative scheme for the whole country. But if the present Congress would declare, in effect, that the 1934 Congress did not intend to preclude this exercise of state police power, we would have re-established the status quo, the status quo "ante Benanti", if you will.

That is, it seems to me, the quickest way we can resolve this dilemma. And I can't think of a better way of concluding this presentation, because I think it sums it up so well, than by quoting Senator McClellan. He made a statement, when he submitted a bill on January 16, 1958 to amend Section 605 of the Communications Act of 1934. I think that statement is an admirable summary of our concern and our hope in this area.

Senator McClellan said at that time, "I am introducing a bill amending Section 605 of the Federal Communications Act to clarify the rights of State law enforcement agencies to use wiretaps to uncover evidence as to the commission of serious crimes. When it is referred to the Judiciary Committee, I shall press for its early approval.

"The Supreme Court in its recent decision in the Benanti case ruled that wiretap evidence obtained by State officers under authority of State law was inadmissible in

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the Federal courts. The language of the decision has left a cloud on the right of the States legally to authorize law enforcement agencies to obtain court warrants to intercept communications in cases where there are reasonable grounds to believe that these agencies would uncover evidence of serious criminal activity.

"The Court did not rule on the constitutional questions. Its decision was based solely on an interpretation of the intention of Congress when it passed Section 605 of the Federal Communications Act of 1934. This Court decision has given me much concern over the effect it would have on law enforcement and prosecution of serious crimes.

"It is my belief that Congress never intended to cripple and hamper law enforcement agencies in their efforts to stamp out crime and punish criminals.

"As Chairman of the Senate Select Committee Investigating into Improper Activities in the Field of Labor and Management, and as a member of the Judiciary Committee, I am cognizant of the problems facing prosecutors and enforcement agencies in their consicientious efforts to eliminate crime and to punish the criminals, particularly the organized criminal syndicate rings engaged in widespread criminal rackets, such as labor racketeering, narcotics, bribery and extortion rings.

"The detection, investigation and prosecution of crime, particularly organized crimes, will be seriously handicapped and weakened. In many cases, prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies.

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"When the Select Committee launched its investigation into the labor situation in the New York area, it did so unaware of the extent that racketeers had penetrated the Teamsters Union and certain other branches of organized labor in the nation's largest city.

"The Committee and I believe the public was shocked at its revelations. What was portrayed was a picture of ruthless gangsters, led by Johnnie Dio and Anthony "Ducks" Corallo, joining in an alliance with Jimmy Hoffa to seize control of the transportation industry in the nation's largest and richest city.

"The control of this strategic economic area by unscrupulous gangsters presented, and continues to present, a threat to the economic security of this country.

"This conspiracy could not have been presented in such clarity without the use of intercepted telephonic messages which were made available to this Committee through permission of the New York State Supreme Court and the offices of the New York County District Attorney.

"Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap.

"It is an interpretation that I cannot accept. In the field of criminal detection and prosecution, the law enforcement agencies are constantly waging a war against criminals who attack society. To do so effectively, it is necessary and essential to intercept their communications.

"Many states, such as New York State, have enacted laws to enable their enforcement agencies to intercept communications under proper safeguards and to eliminate the dangers of promiscuous and improper use.

"In New York, for example, enforcement agencies must apply to the court of highest original jurisdiction for a warrant to permit the interceptions. This warrant is only granted when the court is satisfied that reasonable grounds exist that evidence of crime will be obtained as a result of the wiretap.

"This bill", referring to Senate Bill 3013, "This bill", concluded Senator McClellan, "sponsored by myself and Senators Ives, Ervin, Mundt, Goldwater and Curtis, is to clarify the effect of Section 605 and to assist State law enforcement agencies to give back to the States the right under proper statutory provisions to investigate and prosecute criminals."

That statement most admirably summarizes what we have in mind. The bill was introduced. It died somewhere in committee. I think our best hope—if we are seeking a solution to this problem, and a solution must be found—is to see to it that this bill, or one very similar to it, is reintroduced in this Congress and utilize our combined efforts to see that it is passed.

Thank you very much for your gracious attention.

The Chairman: Thank you very much, Mr. Hogan.

There may be just a few very brief questions that some of the Commissioners may have. I have only one and perhaps you have covered it, but I just want to make it clear for the record and for my own satisfaction.

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Under the law of New York State as at present constituted, with regards to wiretapping, can a private investigator or any other private citizen, under any circumstances, obtain a court order for intercepting a telephone conversation ?

Mr. Hogan: No. He might make application, but he wouldn't get the order.

The Chairman: There has never been such an order granted, as far as you know, is that correct?

Mr. Hogan: Never. That would be true also of eavesdropping, eavesdropping or the interception of a telephonic message.

Commissioner Lane: The only question I have is that it appears there are certain elements in the Congress that do not look upon this problem of wiretapping as we do. In other words, you recall on our visit to Washington a few weeks ago that there was some talk, in that conference with all the New York legislators, about some of the members of Congress from different sections of the country having rather strong feelings against wiretapping.

If you had a mandatory sentence for illegal use of a wire tap, would that influence some of those recalcitrant Congressmen and Senators towards being more favorable to us with reference to this particular bill.

Mr. Hogan: It seems to me a little removed. I would suppose that most courts would inflict a sentence in such a case. To make it mandatory might be a help with some persons, but I think the legislators that you have in mind would not come over to our point of view if that additional bit were put in. And that is why I think it would be much

more difficult to introduce and get passed a bill which would sanction the interception of telephone conversations in the Federal Government arrangement.

There would be persons representing rural areas, perhaps, who are not aware of the problems we have to face in metropolitan areas, who wouldn't appreciate the arguments which I have tried to present this morning.

But you might have more success in simply amending the Federal Communications Act, the legislative contention being that Congress had no will to preclude this and no desire to interfere with state police power.

Commissioner Lane: In other words, just to make it clear that the states can pass their own laws in this particular area.

The Chairman: Mr. Hogan, this Commission is exceedingly grateful to you for carrying the ball on the first play, so to speak, and telling us in such emphatic terms and such convincing terms of the importance of wiretapping as a weapon, especially in the field of organized crime and corruption. And we are exceedingly grateful to you for giving us your time and giving all the thought you have to this wonderful presentation.

Thank you.

Mr. Hogan: Thank you, very much.

I am grateful to you and the Commissioners for giving me the opportunity.

The Chairman: We will take a two-minute recess.

(Short recess.)

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Testimony of Police Commissioner Stephen P. Kennedy, City of New York, Before the New York State Commission of Investigation

The Chairman: The next witness at this public hearing will be the Commissioner of Police of the City of New York, Mr. Stephen P. Kennedy.

Mr. Kennedy, just as a matter of record and background, will you briefly tell us about your experience, your past experience in the area of law enforcement?

Mr. Kennedy: I was appointed patrolman in the Police Department, City of New York, in 1929. I have worked in various branches of the Police Department and have held various ranks successively up to and including that of Chief Inspector. On August 2, 1955, I was appointed Police Commissioner.

I am a member of the Bar of this State, in Federal Districts, Circuit Courts, and admitted to practice in the Supreme Court of the United States.

The Chairman: Please give us your views on this important problem we are considering here today.

Mr. Kennedy: Mr. Chairman, gentlemen of the Commission:

I am very happy to accept the invitation of this Commission to appear and urge as forcefully as I possibly can that the people of this State and the Governor be informed of the plight of law enforcement officials in combatting organized crime because of the uncertainty that now exists in the law concerning Court-authorized telephonic interception.

Now, at the outset, we must recognize the fact that when a criminal act is committed, not only are the civil liberties and rights of the immediate victim or his family or his associates—not only are they violated, but the liberties and

rights of all of us are threatened. Consternation, alarm, fear, are created in the community by the criminal act, and the public peace is disturbed.

If we blind ourselves to this basic premise, we ignore the purpose of public law. In a democracy public law is a creation of the people to protect them in their rights and liberties. It is not a rigid, inflexible code, but a reasonable, pragmatic approach by which the people protect their rights and liberties, and they do that in a way to meet changing conditions brought about by changing times, and they enact such legislation to protect them from the tyranny of the few. We must accept this if we are going to accept the basic premise of public law and the protection of our liberties and rights.

In my view it is of the utmost importance for the safety and welfare of the people of this State and this nation that the present session of the United States Congress shall be importuned to enact legislation authorizing State law enforcement officials to bring criminals to justice, pursuant to the terms of our State Constitution, by using Court-authorized telephonic interceptions under reasonable safeguards.

In a discussion of this problem, two facts must be constantly kept in mind: The first is that it is essential to protect the people from unauthorized invasion of their privacy through the medium of intercepting communications. The second is that law enforcement authorities must have the right, in appropriate cases, to use interception devices within reasonable limits, in the never ending war against crime and criminals.

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The difficult task of detecting and preventing crime must be carried out in the framework of maintaining the civil liberty of the individual. No doubt we could attain greater success in crime prevention if we ignored civil rights, but this is too high a price, and no person, and I know of no law enforcement agency, which would be willing to pay that price.

On the other hand, we should be equally reluctant to accept unbridled individual freedom without regard to the adverse effects upon our nation as a whole. This would result in disproportionate protection for the criminal, with almost total disregard for the civil rights of the victims of vicious criminal acts.

In 1938, the people of the State of New York voted for and ratified, after a great discussion, our Constitution, which embodied a provision for the issuance of ex parte orders for the interception of telephonic communications where reasonable grounds existed for the belief that evidence of crime could be obtained thereby.

In 1942, this provision was implemented by the enactment of Section 813 of the Code of Criminal Procedure. This statute set up procedural safeguards for the issuance of such orders to law enforcement officers. It provided that the person whose conversation was to be intercepted, as well as the line over which the communications would be made, had to be described. The order would remain in effect for not more than 60 days. The reasons on which the necessity for the interception were predicated, and the results of the interception, are required to be explained to the court.

The highest Court in this State has consistently sustained the validity of our State constitutional provision.

No court—state or federal—has ever held that the practice in New York State is in conflict with any provision of the United States Constitution.

The dilemma that law enforcement in this State now finds itself arises from an interpretation of Section 605 of the Federal Communications Act, which prohibits the interception and divulgence of the contents of any telephonic communication. This section was passed by the Congress of the United States in 1934. When our State constitutional provision was enacted in 1938, no one for a moment considered that it was in conflict with Section 605 of the Federal Communications Act.

Indeed, cases that went to the Supreme Court of the United States thereafter—Schwartz against Texas, for example, and People against Stemmer,* a New York case—affirmed convictions based on the reception into evidence of Court-authorized telephonic interceptions in State proceedings.

However, there was a discordant note in United States Supreme Court decisions which stated in effect that state law enforcement officers who intercepted telephonic communications, even pursuant to the organic law of their state, were in violation of federal law and subject to federal prosecution. This is an untenable situation for law enforcement officers.

It is not only unfair, but it is demeaning and stultifying for police officers to place their careers and personal liberties in jeopardy by making State authorized interceptions. This chaotic condition must be corrected.

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* 298 N. Y. 728 (1948), *affirmed*, 336 U. S. 963 (1949).

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It is patently clear that the beneficiaries of the confusion presently existing in the law are those engaged in crime. It is the great majority of law-abiding people who will suffer. Increased criminal depredations by which the overlords of the underworld obtain a greater strangle hold on our economy through the further extension of their grasp on the body politic and the business world will, I believe, inevitably follow.

Just recently a new problem has been added to the morass of confusion in the law. Criminal prosecutions in which court-authorized telephonic interceptions are expected to be used are now faced with the fact that the defendants immediately make application to the Federal Court to restrain the introduction of the testimony into evidence, although this evidence is admissible under the State Constitution and statutes.

It is most difficult to comprehend why judicial decision should strip the arsenal of law enforcement of this weapon at a time when crime is on the increase.

Much misinformation on the subject of telephonic interception has become prevalent, and unfortunately the misconceptions are generally accepted as facts. A prejudice has been created because of an unclear understanding of the problem. The result has been that law enforcement officials, in an attempt to clarify the matter, have been reduced to tilting with the windmills of hearsay, rumor, and unreasoning fear.

As you know, the City of New York is comprised of approximately eight million people, who use 3,775,000 telephones. Over an eight-year period, between 1952 and 1959,

the New York City Police Department obtained an average of 290 Court Orders per year. These figures, it must be realized, represent the City wide totals, and come to less than 60 a year for each borough. This is in sharp contrast to the allegations that thousands of wiretaps are made by the police in this City each year. Certainly nobody could reasonably say that this is wild and indiscriminate use of telephonic interception.

Abuses of our civil liberties by private individuals in the field of telephone and dictaphone interception were demonstrated in the course of hearings conducted by a Joint Legislative Committee of this State. Law enforcement agencies, including the Police Department of this City, strongly urged that those abuses be curbed. Legislation to this end was supported by the Police Department of this City and was enacted.

Obviously, a clear understanding by the people and the Congress of the problems confronting law enforcement agencies is an immediate necessity.

Great strides have been made in the fields of science and communications. The underworld has not failed to take advantage of every technical advance in this field, and it is vital today that law enforcement must be given strong support in coping with modern crime.

Some people have been quoted as saying that police officers should shadow and tail criminal suspects and thus eliminate the need to intercept telephonic communication. Well, I think it is quite obvious that mere shadowing or tailing is a rather primitive method of criminal investigation in this day and age when we realize the vast increases

or advances made in technology. Today a man can step in a jet plane and be on the West Coast in a matter of hours. He can pick up a telephone and call Rome, Naples, the Far East, the Near East, in a matter of minutes.

The concept that telephonic interception is unnecessary and undesirable stems primarily, I think, from the normal conditions of society at the time the Constitution was adopted. But conditions have changed since 1789, and other periods which are usually cited. In the early days we lived in a rural, agrarian economy. People were rooted to their community. The law enforcement officer, the Sheriff, knew with whom he was dealing. He generally could reach out and find the perpetrator of a crime. In small communities there was a cohesiveness and interest in the community that supported the law enforcement officer. Should the perpetrator be successful in getting on a horse and galloping off in the hills, he couldn't get very far. Today the picture has changed. We are in an entirely different environment culturally and technologically, and we must recognize that fact and not impose upon law enforcement agencies the restrictions that were prevalent in a period so totally dissimilar to our own.

I believe that every reasonable and modern investigative technique must be employed legally against the criminal.

The late Robert Patterson, former President of the City Bar Association, former Federal Judge, and former Secretary of War, expressed that, I think, very admirably. He said:

"The underworld to today would rate Jesse James a small-fry amateur. Crime has become big business, with

campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations and the rest. Advantage has been taken of the most modern methods in business organization, swift communications and swift transportation. Advantage has been taken of the lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the times we are living in."

In the field of industrial racketeering, for example there are contacts and meetings with victims for the purpose of perpetrating extortions. Industrial racketeering leads to increased costs in consumer goods. Frequently, the victim does not complain. He is engaged in the competitive business field, and in any case he can pass the added cost on to the consumer, the people who ultimately pay the price of the crime. The victim frequently is merely a middleman and is not out of pocket. For this and for other reasons, he makes no complaint.

Law enforcement agencies do from time to time receive anonymous complaints, but no sworn testimony acceptable in court. Since the victim is invariably reluctant, as I said before, to come forward and give evidence, it must be flushed out with every available weapon, including court-authorized interceptions.

In a substantial number of investigations and prosecutions, the investigative technique of court-authorized interceptions is an indispensable weapon.

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Senator McClellan, Chairman of the Senate Select Committee, investigating into improper activities in the field of labor and management, and a member of the Judiciary Committee, said:

"In many cases, prosecution and investigation of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies. . . . Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and—grant these criminals a 'privileged sanctuary.' . . . In the field of crimnal detection and prosecution, the law enforcement agencies are constantly waging a war against criminals who attack society. To do so effectively it is necessary and essential to intercept their communications."

The District Attorneys of the five counties of New York City, with whom I am in frequent communication and consultation, working in close coordination with the Police Department, have used court-authorized telephonic interceptions with great success in all types of criminal investigations. This weapon is particularly important in the investigation of corruption in public office. The Police Department has used telephonic interceptions to bring to justice corrupt and venal members of the police force itself. Permit me to give you a few examples:

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The use of authorized interceptions during a Departmental investigation of three notorious burglars disclosed that a member of the Police Department was in league with them. Subsequently, all the culprits, including the police officer, were arrested and convicted. It would have been impossible to have made out a case against any of them without the aid of telephonic interception.

In another case, two members of the Police Department were prime participants in crimes involving assault, robbery, and their receiving of stolen property. Similarly, in this case, the telephonic interception resulted in the obtaining of evidence which led to their arrest and conviction.

Another case in this category concerned a 70-year-old man who was viciously beaten and robbed. Police investigators, employing court authorized telephonic interception, were able to identify and to arrest the persons responsible, including a member of the Police Force. All were later convicted. Here again, it would not have been possible to establish their involvement in the crime were it not for the use of telephonic interceptions.

I could go on. I am certain that you recall that court-authorized telephonic interception was used extensively in breaking up several rings of conspirators who had wormed their way into professional and collegiate basketball and football. Their stock in trade was the corruption of our college youth engaged in the games mentioned by offering them easy money in return for setting up betting coups.

Many narcotic prosecutions of substantial quality would not have been possible without the evidence obtained as a result of legal telephonic interceptions.

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Congressional Committees investigating the narcotics traffic, labor racketeering, and juvenile delinquency have made use of evidence uncovered as a result of court-authorized interceptions in this State. Investigations conducted by the Kefauver Committee, and more recently by the McClellan Committee, are two instances which immediately come to mind.

The December 1957 Queens County Grand Jury and the New York County Grand Jurors Association have strongly recommended that law enforcement officers be permitted to continue using telephonic interceptions pursuant to court order.

In May 1958, Senator Kenneth B. Keating of New York stated:

"Congress never intended to prohibit State officials from tapping wires when authorized by State law. . . . The State-authorized wiretapping approval by Congress would be especially helpful in New York State, which for some time has made careful and effective use of its wiretapping laws. Since many of the kingpins of organized crime in America operate in and out of this State, and the drive will be initially concentrated there, use of wiretapping by State officials can be of inestimable help. I would estimate conservatively that over half of the 100 top hoodlums sought by the Justice Department have their roots in the Empire State. Proper wiretapping can help wipe out the power of invisible government which has infected portions of the State."

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On January 20, 1958, the New York Times in an editorial stated:

"The sensible resolution of this conflict between the rights of the individual to privacy and the right of society to protection against infamous crimes seems to have been achieved in practice in New York, where wiretapping has been legal under the laws and Constiution when carried out by law enforcement officers under judicial restraints."

It is manifestly inefficient to impose duties and obligations on law enforcement officials while failing to supply them with the necessary tools which they must use to do the job. Judicial decisions on the Federal level not only prune the sick leaves from the tree but sever the healthy branches as well.

It is the people of the State who are prejudiced by the present rule of exclusion. The effect is to make arrests and successful prosecutions much more difficult, if not at times virtually impossible.

Prosecuting officials and Grand Juries should not be circumscribed in their endeavors to detect crime and bring criminals to justice.

Police officers should not face the possibility of arrest while attempting to carry out the law of the State.

Corruption in public office should not be made more difficult to discover.

Criminals should not be afforded this sanctuary.

The civil rights of the victims of crime should not be sacrificed for the benefit of those who threaten the civil rights of all of us.

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In order to remove these unwarranted roadblocks to efficient law enforcement and greater public protection, the Police Department recommends that the present session of the United States Congress enact into law an exemption from the provisions of Section 605 of the Federal Communications Act for law-enforcement officers of the various states and its political subdivisions, while acting in compliance with state law.

In addition to that, there are several queries that I think ought to be proposed to the people. I can think, and I suppose you can too, of a number of cases which would fall within the provisions of 605. Let us consider whether, in this hypothetical case, Section 605 is applicable:

A child is kidnapped and the kidnapper, identity unknown to father, calls the father, warns him not to tell anyone else, demands ransom or death to the child. Mother intercepts message on another extension. Mother recognizes voice of kidnapper. Father complies with instructions. Money is paid. The child is found dead.

Would 605 prevent the divulgence of the mother's testimony? 605 says "no person, not being authorized by the sender". In this case, the sender said, "Don't tell anyone; don't tell your wife". He knows perfectly well if the wife hears his voice she will recognize him. She has not been authorized by sender to intercept any communication and divulge or publish the existence, contents, subject, purport or effect of the interception of the communication to any person.

Query: Does 605 prevent the introduction of this evidence in a Federal Court?

What if the interceptor were a Federal officer? A State Officer? What would be the effect of Section 605 then? Would it make a difference if the kidnapper were prosecuted in a Federal Court or a State court? I think the people of this State and this City and this Nation should think about this case, and I know there are many others that could be proposed in determining whether or not Section 605 is a realistic approach to the problems which confront not only law enforcement officers but the people of the City, State and Nation in the protection of their rights and liberties.

Thank you very much, gentlemen. I appreciate the opportunity of being here and I'm sorry if I took too much of your time.

The Chairman: You certainly have not taken too much of our time at all, because every word that you have spoken I think has meat and meaning, Commissioner.

I should like to ask you this question:

Isn't it true, at least it has been my experience, that people who are on the other side of public corruption—in other words, a fellow who offers or pays a bribe—can rarely be gotten to testify in that kind of a case, and in that kind of a case, as I think you have already indicated, it is frequently very important to be able to intercept telephonic communications?

Mr. Kennedy: Yes, that is quite right, because the bribe-giver is in cahoots with the bribe-taker. Frequently he doesn't want to pay the bribe if he can avoid it, but the overriding consideration is that he gets away with his illegal activity; hence he gives the bribe whether, it is de-

manded or extorted from him or given voluntarily. Therefore, being in pari delicto you are not going to have one testifying against the other. So you have to, by other independent means, make a break through in any matter of official corruption.

The Chairman: I think the examples you cited of members of your own Department are a powerful argument for the very thing you are trying to reach, the very conclusion you are trying to reach here, the conclusion that the public should be made aware of the importance of this sort of thing.

Commissioner Grumet?

Commissioner Grumet: You gave a very forceful illustration in that kidnapping situation. Now, as a matter of fact, if there had been interception of a telephonic communication between two of the people who were going to attend that meeting at Apalachin, New York—unfortunately, there was not, as far as I know—but if there had been, why, the authorities would not be able to disclose what transpired at Apalachin, New York; isn't that so?

Mr. Kennedy: That is my understanding of 605.

Commissioner Grumet: You also pointed out the speed with which we travel these days and how the picture has changed. The Apalachin, New York, meeting provides an illustration of the distant parts from which some of these fellows come, and they are in touch with one another.

Mr. Kennedy: The conditions under which people live today differ so radically from the past. Before the invention of the telephone—I can understand why some people look upon these modern gadgets as suspect, and so on, but we've got to meet the situation which we are confronted with today.

As I said before, the people enacting their public laws for their own protection do not set up an inflexible code of human behavior, but it is changeable to meet changing conditions.

Commissioner Grumet: Commissioner, am I right in saying—you referred to the McClellan Committee and the conversations that were introduced in evidence before that Committee—am I right in saying that some of those conversations that went into evidence before the McClellan Committee were between Johnny Dio in New York and Hoffa in Detroit? Am I right? Is that your recollection?

Mr. Kennedy: There were a number of principals involved in that case. I think the records are replete with—

Commissioner Grumet: My recollection is that Johnny Dio was talking to Hoffa in Detroit on a number of occasions, unless I am mistaken.

Mr. Lumbard, is that right?

Mr. Lumbard: That is correct.

Commissioner Grumet: Which is another illustration of the thing you were saying.

Mr. Kennedy: Yes. Here you have the Congress of the United States using—divulging, if you will—

Commissioner Grumet: Here you have these two people talking to each other from distant points.

Mr. Kennedy: Yes.

Commissioner Grumet: And apparently having business in common.

Mr. Kennedy: Another query might come to mind: was the Congress in violation of 605 when these remarks were published? Were they "divulged", within the meaning of that word as used in Section 605?

Mr. Lumbard: One such conversation between Hoffa and Dio was set forth in Part 13 of the McClellan Committee Hearings at page 5120.

Commissioner Grumet: Between Hoffa and Dio?

Mr. Lumbard: Yes.

Commissioner Grumet: Was Dio in New York and Hoffa in Detroit? I think they were. That is my recollection.

Mr. Lumbard: That may be. I don't think the record shows where the two persons were. However, it was a telephonic interception that came from the authorities of New York State, and the interception had been made pursuant to lawful—

Commissioner Grumet: It is a fact, isn't it, Commissioner, that racketeers and gangsters in New York are in constant touch with racketeers and gangsters in other parts of the country as far west as California, and also it is international in its scope?

Mr. Kennedy: I think—

Commissioner Grumet: And into narcotics?

Mr. Kennedy: I think that is a reasonable conclusion. I think there has been enough evidence adduced to indicate that.

Commissioner Grumet: Obviously, if the law enforcement officers are going to be prevented from intercepting some of those communications, they are going to be stymied.

The Chairman: Commissioner, as the chief law enforcement officer in the largest community in this country of ours, your word unquestionably carries great weight with us, and I am sure with the people of the State of New York, and the people of the entire country. We are grateful to you,

not only for appearing here but for the very forceful way in which you have brought to the fore the core of the problem that is faced by you and other law enforcement officers in the State of New York, and by this Commission in its effort to unearth facts regarding organized crime, regarding public corruption and other things that this Commission is interested in. I am very, very hopeful indeed, and the entire Commission is, that the words of people like you will bear such weight with the Congress.

Thank you very much.

Commissioner Grumet: May I add one word on behalf of not only the New York City members sitting here but also my colleagues from upstate, that we want to go on record as saying that we have a very fine Police Commissioner.

Mr. Kennedy: Thank you very much. I want to thank the Commission for giving me the opportunity to speak. This matter is not one that was treated lightly. It is a considered opinion about which I have thought for a great period of time, weighing on the one hand the rights and liberties of the individual, and weighing on the other hand the rights and liberties of the people. It hasn't been something that was just whipped up out of thin air. I have given it very, very grave consideration, and these are my opinions and I am happy for the opportunity to present them to you gentlemen.

The Chairman: Certainly, Commissioner, the desire for wiretapping under proper safeguards is not an attempt by you or your department to find an easier way to enforce the law?

Mr. Kennedy: Definitely not. I think it is a situation with which you are confronted. It is not an easier way. There is no alternative.

The Chairman: That is exactly what I believe.

Thank you very much.

Mr. Kennedy: Thank you, sir.

(A recess was taken.)

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